POLICE ACADEMY

715 McBride Blvd. New Westminster B.C. V3L 5T4

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

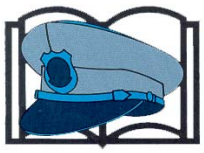
On December 14, 2005, 25-year-old Laval Police Constable Valerie Gignac was shot and killed after responding to a call at an apartment building about an extremely agitated and aggressive person. When she knocked at the suspect's door, Constable Gignac was shot once through the closed door by a male suspect armed with a high-calibre rifle. After being shot, her partner administered CPR on her until paramedics arrived. She was transported to hospital where she succumbed to her injury.

The suspect barricaded himself in the apartment, resulting in an armed stand-off with police SWAT teams from both the Laval Police Service and the Quebec Provincial Police. The suspect was known to police and they had responded to his apartment before. After hours of negotiation, he surrendered to police with no further incident.

Constable Gignac had served with the Laval Police Department for 4 years and had previously served with the Police de Repentigny for 8 months. She is survived by her husband, also a Laval constable in the K-9 section.

The preceding information was provided with the permission of the Officer Down Memorial Page: available at www.odmp.org/Canada

'IN SERVICE: 10-8' NOW IN 6th YEAR



The Police Academy's "Peer Read Publication" has entered its sixth year of printing. Back issues are available from 2001, 2002, 2003, 2004, 2005 and now 2006 on the Police Academy website at www.jibc.bc.ca.

From the inaugural issue it was clear that this newsletter was not about glossy paper, fancy pictures, or sleek advertising. Rather, it was just a plain, black letter publication keeping the front line officer current with issues facing them on the street. Readers were told to feel free to copy the newsletter and pass it on to colleagues. From our tremendous e-mail response, we know this has happened.

Police officers make decisions every day requiring careful and prudent deliberation that will impact people's lives, in some cases forever. Errors can be costly. When the cops screw up, cases, careers, and even lives can be at stake. "There is an old saying, 'Doctors bury their mistakes while lawyers send theirs to prison'. Police officers do a little of both"[1].

This is one reason why the "In Service: 10-8" newsletter was created. It is a quick way to stay on top of the game. Of course, it is not the end-all-be-all. It is simply one method of bringing that golden legal nugget from the courtroom to where it counts, the street. Be smart and stay safe!!!

[1] Holden, R. (1986). Modern Police Management. Englewood Cliffs, NJ: Simon & Scuster, Inc. at p.243.

HIGHLIGHTS IN THIS ISSUE

Unless otherwise noted, all articles are authored by Sgt. Mike Novakowski, MA (Abbotsford Police). The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed are not necessarily the opinions of the Justice Institute of British Columbia. "**In Service: 10-8**" welcomes your comments on or contributions to this newsletter. If you would like to be added to our electronic distribution list e-mail Mike Novakowski at mnovakowski@jibc.bc.ca

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'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR

"I might only be repeating what others told you many times over. However; here it is once more. Your publication should be mandatory reading for all serving police officers in BC"—**Police Officer, British Columbia**

****

"Thank you for making such a great resource available to agencies in the field"—**Master Corporal, Military Police**

****

"Can you load me onto your e-mailing list for the publication? It's well put together and you always seem to have a handle on the "cut through the crap" angle of things"—**Police Constable, British Columbia**

****

"Please add me to your distribution file for the 10-8 newsletter because I find it so palatable and can use it to create learning activities for my police recruit students"—**Recruit Training Unit, Alberta**

****

"I was just put onto [In Service:10-8] by a co-worker and I can see it being a useful tool in staying on top of things"—**Police Constable, RCMP British Columbia**

****

"The articles are excellent tools for any police officer to stay up to date on current legislation. I appreciate the quality of your work and look forward to future readings"—**Police Constable, Alberta**

****

"I have never seen this publication before and I noted several very informative cases and would ask that you place me on your electronic distribution list so that I can share Service 10-8 with the other members of our unit"—**Police Corporal, RCMP British Columbia**

'IN SERVICE' LEGAL ROAD TEST NEW

The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law. Each question is based on a case featured in this issue. See page 37 for the answers.

1. Firearm ownership in Canada is…
   (a) a constitutional right
   (b) a privilege

2. When searching as an incident to lawful arrest the police need not consider exigent circumstances (ie. whether or not obtaining a warrant would be practical).
   (a) true
   (b) false

3. When a police officer relies on a roadside breath test "fail" result for reasonable grounds the Crown must prove the testing apparatus was an approved screening device under the *Criminal Code*.
   (a) true
   (b) false

4. A protective pat down search by police incident to an investigative detention is an automatic power without the need for a legitimate safety concern.
   (a) true
   (b) false

5. A pocket search at the border by Customs officers is part of the routine screening process and does not give rise to any *Charter* issues.
   (a) true
   (b) false

Note-able Quote

Courage is fear that has said its prayers— Dorothy Bernard

TWO COMMUNICATIONS SUFFICIENT TO MEET 'REPEATEDLY' REQUIREMENT

R. v. Ohenhen,
(2005) Docket:C41405 (OntCA)

The accused was arrested and sentenced to 30 days in jail and three years probation after persistently calling the victim and eventually threatening to rape and kill her and bomb her house and family. Shortly after the trial the victim received a card from the accused stating, "I hope you had a Merry Christmas." She threw it away and moved on with her life. About nine years later the victim received a letter from the accused with a hand written heart on it stating, "Get back to me." The letter had a return address from a mental institution and the victim felt threatened by it. She contacted the police and the letter was copied and mailed back to the institution marked "return to sender."

Eighteen months later the victim received another upsetting letter from the accused that was post marked from Toronto. This letter scared the victim. The victim called police and the accused was charged with uttering threats under s.264.1 and criminal harassment under s.264(2)(b), both *Criminal Code* offences. He was acquitted of the threatening charge, but convicted of criminal harassment by a judge and jury.

The accused appealed to the Ontario Court of Appeal arguing his conduct in sending two letters over 18 months did not amount to "repeatedly communicating", as required by s.264(2)(b). The accused's argument was mainly based on a British Columbia Court of Appeal decision in R. v. Ryback (1996) where a judge stated, "Three communications would seem to be the minimum number sufficient to justify being described as 'repeatedly'".

Justice MacFarland authoring the unanimous judgment of the Ontario Court of Appeal, however, disagreed with the accused. She stated:

> In my view, the dictionary definitions of the words "repeat" and "repeated", from which the adverbial form "repeatedly" is derived, lead me to conclude that conduct which occurs more than once can, depending on the circumstances of the case, constitute "repeated" conduct or conduct which is "repeatedly" done and the section is met. In my view, it is unnecessary that there be a minimum of three events or communications. "Repeatedly" obviously means more than once but not necessarily more than twice.
>
> While one instance of unwanted conduct can be sufficient to satisfy s. 264(2)(c) and (d), it will not be sufficient to satisfy s. 264(2)(b). More than one instance of unwanted conduct will be necessary to meet paragraph (b); however, in my view, there is not and should not be any minimum number of instances of unwanted conduct beyond this to trigger these subsections. Provided the conduct occurs more than once, in my view, the *actus reus* can be made out. It will be a question of fact for the trier in each case whether there has been repeated conduct. The approach is a contextual one. The trier will consider the conduct that is the subject of the charge against the background of the relationship and/or history between the complainant and accused. It is in this context that a determination will be made as to whether there has been repeated communication. On the facts of this case, it was clear that neither of the communications could be characterized as innocuous or accidental. In the context in which they were made, these two communications would be sufficient to constitute "repeatedly" communicating as set out in s. 264(2)(b). In my view, it was entirely appropriate for the trial judge to use the standard charge language on this point. [paras. 31-32]

The accused's appeal was dismissed

Complete case available at www.ontariocourts.on.ca

REASONABLE & PROBABLE GROUNDS MORE THAN SUSPICIONS

R. v. Legere, 2005 NBCA 100

The accused was involved in an accident for no apparent reason and had an odour of alcohol on his breath. There were five others in the vehicle and alcohol was found outside it. The officer had a suspicion the accused had been drinking and was impaired while driving. He was also told by one of the passengers that all the occupants had been drinking. At the hospital the officer read the blood demand and blood samples were taken.

At trial in New Brunswick Provincial Court on charges of impaired driving causing death and dangerous driving causing death the trial judge concluded the officer did not have reasonable and probable grounds to justify the blood demand because he only had enough to support a suspicion. The trial judge stated:

> [The police officer] testified that he concluded that the driver may have been drinking, may have been impaired while driving, and that he had to look further into it. And as I said earlier, it – it is a suspicion, yes, a reasonable one, that they were drinking and he was driving. Then he testified that …he read the blood demand since he believed he had enough grounds. This is not to say that the officer must state his conclusions in every case. For instance, where the signs of impairment are overwhelming. This was far from being the case here. You have an accident which could be attributed to driver inexperience, distraction, speed, as much as the consumption of alcohol factor. The accused in no way was behaving like a person under the influence of alcohol. I would even go so far as to say that it looked the opposite. Then you have an officer testifying about suspicions where there – the available information that the officer had and the

> observation that he made only appear to support suspicions…

Since the blood demand was unlawful, the collection of the samples violated the accused's rights under s.8 of the *Charter*. The results of the tests were then excluded under s.24(2). The Crown then appealed to the New Brunswick Court of Appeal arguing the trial judge used the wrong analysis in deciding whether the officer had the requisite belief to make the demand.

Justice Deschenes, writing the judgment of the court, dismissed the appeal. The Crown bears the burden of proving that the officer had the necessary grounds to make the demand. Reasonable and probable grounds requires an officer hold a subjective belief in their mind and the grounds must be objectively justified—a reasonable person standing in the shoes of the officer would conclude there were reasonable and probable grounds. If the Crown cannot prove the necessary grounds, the demand is unauthorized and unlawful. The Court of Appeal concluded the trial judge made no error in coming to his conclusion.

Complete case available at www.canlii.org

ROADSIDE TEST MUST BE GIVEN FORTHWITH: FIVE MINUTE DELAY TOO LONG

R. v. McConville, 2005 BCPC 488

The accused was stopped for traffic infractions and the officer formed a reasonable suspicion she had alcohol in her body. There was a faint odour of alcohol on her breath, her eyes were bloodshot and glassy, and there was some discussion about her consuming alcohol earlier. The officer waited five minutes to ensure there was no mouth alcohol present even though he had no reason to believe there was any. During a *voir dire* in British Columbia Provincial Court, Judge Moss ruled that the officer violated the accused's *Charter* rights. He stated:

> If you look at the case authority, his obligation is to not delay the taking of breath samples into the approved screening device. I do not see any *mala fides* on his part. He seemed to think he was doing the accused a favour.
>
> One has to remember that the police have the accused in their care and under their detention in order to obtain the roadside breath sample, thereby limiting Charter rights. Section (1) provides for this to take place. If there is no reason to wait the five minutes, then, in my view, his obligation is to forthwith obtain the test. Clearly, he could have done so. He chose to wait the five minutes, thereby, in my view, taking him outside of the realm of reasonableness for obtaining the breath sample into his approved instrument. [para. 6-7]

And further:

> I am of the view he did not commit simply a technical breach but rather, a fundamental breach in waiting the five minutes. He had an incorrect, or a misunderstanding of his obligations. I feel sorry for the officers when they get faced with this sort of a conundrum, but I cannot find that on the facts of this case he had any right to wait the five minutes to take the sample and to talk to the accused. She was being detained roadside. His obligation was to provide her with her Charter rights, and waiting for five minutes here, in my view, is far too long, with no reason. [para. 11]

The evidence was excluded under s.24(2) of the *Charter*.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

When we long for life without difficulties, remind us that oaks grow strong in contrary winds and diamonds are made under pressure—Peter Marshall

ON-DUTY DEATHS RISE

On-duty peace officer deaths in Canada rose by four last year. In 2005, 11 peace officers lost their lives on the job. This matches the 10-year highs of 11 deaths in 1997 and 2002.

Over the last 10 years motor vehicles, not guns, posed the greatest risk to officers. Since 1996, 35 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (24), vehicular assault (2), and being struck by a vehicle (9). These deaths account for nearly 44% of all on-duty deaths, which is more than twice the next leading causes of gunfire (14) and aircraft accidents (12). On average, eight officers each year lost their lives during the last decade, while 1996, 1998, 1999, and 2003 had the least deaths at six per year.

2005 Roll of Honour

Constable Anthony Gordon
Royal Canadian Mounted Police, CAN
End of Watch: March 3, 2005
Cause of Death: Gunfire

Constable Lionide Johnston
Royal Canadian Mounted Police, CAN
End of Watch: March 3, 2005
Cause of Death: Gunfire

Constable Brock Myrol
Royal Canadian Mounted Police, CAN
EOW: Thursday, March 3, 2005
Cause of Death: Gunfire

Constable Peter Schiemann
Royal Canadian Mounted Police, CAN
End of Watch: March 3, 2005
Cause of Death: Gunfire

Constable J.M.J. (Jean) Minguy
Royal Canadian Mounted Police, CAN
End of Watch: June 3, 2005
Cause of Death: Drowned

Constable Jose Agostinho
Royal Canadian Mounted Police, CAN
End of Watch: July 4, 2005
Cause of Death: Automobile accident

Constable Andrew Potts
Ontario Provincial Police, ON
End of Watch: July 20, 2005
Cause of Death: Automobile accident

Constable Daniel Rathonyi
Niagara Regional Police Service, ON
End of Watch: September 15, 2005
Cause of Death: Heart attack

Wildlife Protection Officer Nicolas Rochette
Ministère des Ressources Nature, QC
End of Watch: November 5, 2005
Cause of Death: Aircraft accident

Wildlife Protection Officer Fernand Vachon
Ministère des Ressources Nature, QC
End of Watch: November 5, 2005
Cause of Death: Aircraft accident

Constable Valérie Gignac
Police de Laval, QC
End of Watch: December 14, 2005
Cause of Death: Gunfire

**"They are our heroes.
We shall not forget them."**[2]

During 2005, the U.S. lost 150 peace officers. In the U.S. the top cause of death was gunfire (59) — including accidents — followed by automobile accident (32), heart attack (15), and vehicular assault (14). The state of California lost the most officers (18), followed by Texas (13).

[2] Inscription on Canadian Police and Peace Officer Memorial—Parliament Buildings Ottawa, Ontario.

Canadian Peace Officer On Duty Deaths (by year)											
Cause	**2005**	**2004**	**2003**	**2002**	**2001**	**2000**	**1999**	**1998**	**1997**	**1996**	**Total**
Aircraft accident	2		2		1	2	1		4		12
Assault		1									1
Auto accident	2	1	3	5	2	1	1	2	2	2	21
Drowned	1				1			1	1	1	5
Fall						1					1
Gunfire	5	1		1	2				3	2	14
Heart attack	1	2		1		1		1	1		7
Motorcycle accident			1			2					3
Natural disaster				1							1
Stabbed		1						1			2
Struck by vehicle				3		2	2	1		1	9
Training accident					1		1				2
Vehicular assault		1					1				2
Total	**11**	**7**	**6**	**11**	**7**	**9**	**6**	**6**	**11**	**6**	**80**

Source: Officer Down Memorial Page www.odmp.org/canada [January 02, 2006]

US Peace Officer On Duty Deaths	
Cause	**2005**
Aircraft accident	2
Auto accident	32
Bomb	1
Drowned	2
Duty Related Illness	2
Fall	2
Gunfire	52
Gunfire (Accidental)	7
Heart attack	15
Motorcycle accident	4
Stabbed	1
Struck by vehicle	10
Training accident	1
Vehicular assault	14
Vehicle Pursuit	5
Total	**150**

Source: Officer Down Memorial Page www.odmp.org [January 02, 2006]

NO REALISTIC OPPORTUNITY TO CONSULT LAWYER: RSD DELAY OK

R. v. Singh,

(2005) Docket:C43677 (OntCA)

A police officer made a demand for the accused to provide a breath sample into a roadside screening device (RSD). The officer did not have an RSD with him and had to detain the accused for 10 minutes while he waited for one to arrive. At trial in the Ontario Court of Justice the judge found there was not a realistic opportunity for the accused to consult counsel before the RSD arrived. The judge made this finding because it was late at night, the officer had a reasonable belief the RSD would arrive in 5-10 minutes, the fact an RSD did arrive in 10 minutes, and the offering of the test without further delay once it was operable. The judge, however, did not determine whether the accused had a cell phone in his possession

The accused appealed to the Ontario Superior Court of Justice where the findings of the trial judge were overturned. In the Superior Court Justice's view, the accused had a cell phone with him and the officer did not know when the RSD would arrive when she made the demand. The Crown then appealed to the Ontario Court of Appeal arguing that the appeal court judge erred.

The Ontario Court of Appeal agreed with the Crown and the accused's conviction was restored. The trial judge's ruling that there was no realistic opportunity to speak with a lawyer was justified. The delay was not unknown and "the officer reasonably anticipated a five to ten minute delay." Furthermore, the trial judge made no finding whether the accused had a cell phone. The Superior Court Justice was not entitled to substitute his opinion for that of the trial judge.

Complete case available at www.ontariocourts.on.ca

OFFICERS MAY APPROACH VEHICLE ON PRIVATE PROPERTY TO INVESTIGATE

R. v. Soal,
(2005) Docket:C43184 (OntCA)

A bartender called police reporting that she believed the accused was impaired and had recently left the bar. Police checked the name provided and attended to the accused's address. In the driveway of the private residence police located a parked vehicle that was running with loud music coming from it. The officer walked up to the vehicle and found the accused passed out in the driver's seat. She tapped on the window and opened the door. She identified the accused and detected a strong odour of alcohol on his breath, noted his face was flushed and that his pupils were not level with his eye openings. He was asked to get out of the truck and was unsteady on his feet. He was then arrested for impaired operation of a motor vehicle and later failed a breathalyzer test. At no time did the accused ask police to leave the property or were there any signs prohibiting the public from entering.

At trial in the Ontario Court of Justice the judge convicted the accused of impaired driving, finding the police did not violate his s.8 *Charter* rights when they entered onto his property without a warrant and looked into his vehicle, opened his door, and asked him his name. The accused appealed to the Ontario Superior Court of Justice arguing the entry onto the private property and search of the vehicle were unlawful and unreasonable under s.8. The evidence, he submitted, should therefore be inadmissible under s.24(2).

Superior Court Justice Durno accepted that when the officer looked into the truck and opened the door she was conducting a warrantless search, which was prima facie unreasonable. The Crown, not the accused, therefore bore the burden of establishing the reasonableness of the search.

Police Right to Enter Private Property

After reviewing a number of authorities, Justice Durno concluded that in some cases the police are entitled at common law to enter private property to conduct an investigation. It was important to note, that in this case, it was not a dwelling house that was entered. Furthermore, the owner of a motor vehicle has a reduced privacy interest compared to a home. In ruling that the officer had the right to enter onto the property, Justice Durno wrote:

> While all of these cases can be distinguished on the facts, they support the conclusion that police can enter private property to conduct an investigation in some circumstances without a warrant. Here, the officers had information that a person was driving while impaired. They had a name and an address where a person by that name lived. The vehicle they saw in the driveway was similar in description to the complaint received. They knew the vehicle had recently left a local bar. When they arrived, they saw the vehicle with the engine running and the radio playing loudly in a residential area. The officers could not see the driver from the road.
>
> [Although] the officers did not see the [accused] drive his vehicle to that location...I am persuaded that the officers were acting within their common law authority noted above, having regard to the situation the officers faced. They could not see the driver. They had grounds to believe that the driver was impaired. The engine was running. To require them to obtain a warrant was unrealistic in that situation. All of the foregoing was a sufficient basis upon which the officers could have a reasonable belief that the vehicle in the driveway was one which had been driven there by the person who had been cut off at the bar because he was impaired. It is not essential that the officers had grounds to arrest the [accused] at the time they went on to the private property. The information known to the officers was sufficient to give the

officers common-law authority to take investigative steps...[paras. 28-29]

As for whether or not the officer violated the accused s.8 *Charter* rights by looking into the vehicle, opening its door, and asking the accused his name, Justice Druro stated:

> …When the officer approached the truck, she saw a man apparently passed out behind the steering wheel. While the officer said that she intended to check on the man's well being but did not ask him if he was all right, I am not persuaded that that omission defeats the legitimate police authority to investigate. In any event, the officer wanted to determine if the [accused] was okay. When she opened the door and made her observations, it was a reasonable conclusion, in the absence of any indication to the contrary by the [accused], that there was no concern for his well-being, although he was impaired. It was not unreasonable for the officer to open the door to check on the [accused] and continue her investigation. Once the officer made her observations of the [accused], it was apparent he was intoxicated and that she had reasonable and probable grounds to arrest. [para. 30]

Furthermore, "there is a compelling public interest in detecting impaired drivers, and in preventing persons from driving while impaired." With respect to asking the accused his name, the Superior Court concluded he was not under arrest or detention at the time and his rights were not violated. Even if his rights were violated, the officer's observations and the breathalyser results were nonetheless admissible under s.24(2)[3].

The accused again appealed, this time to the Ontario Court of Appeal. The appeal court, however, found no error in Justice Druno's reasoning and dismissed the appeal.

Complete case available at www.canlii.org

[3] See R. v. Soal, (2005) Court file No.M2392/04 (OntSCJ) for facts and details of lower court judgments.

ONTARIO COURT HOLDS NO s.10(b) REQUIRED FOR INVESTIGATIVE DETENTION

R. v. Ngo, 2005 ONCJ 217

Three plainclothes street crime unit members were patrolling a local billiards parlour that had been the location of drug, liquor, and weapons offences, including a shooting, when they saw the accused and another man exit and walk through a cat walk at the rear of the shopping plaza. The other male went to a parked vehicle, removed something from the glove box, then went to the accused where the two huddled together looking at the thing. The three officers approached on foot and announced "Police", while walking up in such a way to separate the men from each other.

The other man was arrested for having marihuana. When asked if he had anything on him that he shouldn't, the accused replied he had a knife and a baton. The accused was patted down and a knife and baton were found. He was also wearing a bullet proof vest. The accused was searched and car keys were found on him. The car was also searched and police found a sword and machete in the trunk. The accused was then charged with two counts of carrying a concealed weapon (extendable baton and flick knife) and two counts of possession of a weapon for a dangerous purpose (sword and machete).

At trial in the Ontario Court of Justice the judge noted a number of *Charter* rights—such as s.8, s.9 and s.10—were engaged in this police contact and the legal issues involved when he stated:

> This seemingly simple case touches a lot of *Charter* nerves. Was it good police work - or a serious violation of constitutional rights? The resolution of this question is important because the type of interaction between the defendant and the police that occurred here

> seems to be a common occurrence in this jurisdiction. [para. 12]

Detention

In first finding the accused was detained for the purposes of the *Charter*, Justice Duncan held:

> While the police officers testified that the [accused] was detained from the point of their first contact, their belief or opinion is not determinative of the issue, anymore than it would be if they held the opposite view.
>
> Police officers are entitled to approach and speak to anyone about anything, though there is no corresponding duty to answer and the police have no authority to detain anyone in the process…
>
> Detention" in a constitutional sense is not the same as in common parlance. Not every interaction between police and an individual that keeps the individual in the officer's presence amounts to a detention. At a minimum there must be physical or psychological compulsion...
>
> In this case, it is my view that the defendant was detained. The investigative purpose of the interaction, the rapid advance, the exclaiming of their authority – "Police!" - the taking control of the defendant and separating him physically from [his companion], amounted to a detention within the meaning of sections 9 and (possibly) 10 of the *Charter.*
>
> Further, in the particular facts of this case, for reasons that will become apparent below, it is necessary to be precise as to when the detention occurred. I find that the process of detention began when the police approached and announced their authority, though it was not completed until an instant later when physical control of the two targets was affected. [paras. 13-17]

However, the first stage is assessing whether the police are permitted to detain persons for investigation is whether they have reasonable grounds to detain (articulable cause). This requires a reasonable suspicion the detainee is criminally implicated in the activity being investigated. Here, Justice Duncan concluded there were no such grounds. He stated:

> In this case, it is my view that the objective facts up to the point of the police advance on the [accused] provided no reasonable basis for the police to suspect any criminal activity. The circumstances described – two young men going to a car, one retrieving something and both looking at it – are not reasonably suggestive of criminal activity at all. Yet it was these facts alone that triggered the police action.
>
> I was initially inclined to think that the concealment of the item by [the accused's companion] provided an additional fact that may have elevated the circumstances to the required level of reasonably based suspicion. On reflection, I do not think that is so. Most basically, the circumstances still fall short. Beyond that, the decision to investigate and to detain for investigative purposes appears to have already been made at the time of the police approach and announcement of their presence. The concealment appears to me to have been a fortuitous occurrence that should not be granted pivotal significance in assessment of the legalities of what occurred thereafter. Put another way, as found above, the groundless detention began to take place an instant before the concealment. The police cannot rely on the target's response to their actions to justify what they had already begun to set in motion. [paras. 19-20]

Thus the detention was arbitrary and a violation of s.9 of the *Charter*.

Search

Since the detention itself was unlawful, the search of the accused was unreasonable under these circumstances. Furthermore, the Crown could not demonstrate that the warrantless search of the car was reasonable.

Right to Counsel

In assessing whether the accused should have been advised of his *Charter* right to counsel,

Justice Duncan opined that a s.10(b) warning is not required for investigative detention. Citing the Supreme Court of Canada's decision in R. v. Mann, 2004 SCC 52, which left the question of whether a person detained for investigation is entitled to be advised of their right to a lawyer unresolved, he wrote:

> It is obvious to me that the provision of the 10(b) right to counsel – both its informational and operational components – is incompatible with investigative detention. It cannot be that the first thing out of the mouth of a police officer who lawfully stops a car or engages in a lawful investigatory detention on the street, is the multi-part informational component of the right to counsel. Less so, can it be that the detainee can exercise the right. The context and the need for such detentions to be brief militate against a right to counsel in this situation.
>
> Still, there is authority suggesting that at least the informational component of the 10(b) right applies even in these situations… The Court's judgment in *Mann* puts the continued vitality of the holding in *Debot* in some doubt. In any event I think *Debot* is distinguishable as a case where the police officer actually had grounds to arrest but deferred arrest (and the informing of rights to counsel) until after a brief search and detention.
>
> Reconciliation of the reality of investigative detention with the words of section 10(b) is not easy. But it seems to me that two approaches are available. First, it could be that "detention" under 10(b) should carry a different interpretation than it does under section 9 or even 10(a). Odd as this may seem, there is authority, in the leading case of *R v Therens (1985) 18 CCC3d 481*, for this approach. There it was held by Ledain J, speaking for the full Court on the point, that section 10(b) contemplated a different type of detention – less prolonged and secure - than did 10(c) dealing with *habeas corpus*. Adopting this to the present case, "detention" as it applies to 10(b) as opposed to section 9 or 10(a) carries the additional feature of arising only where the detention is such that the detainee might reasonably require legal advice. Therefore, the right to counsel of the stopped motorist and the individual subjected to investigative detention, at least without more, does not arise.
>
> The other approach is to view investigative detention as a legal rule that implicitly amounts to a reasonable limit on the right to counsel. Authority abounds for this in the context of roadside screening which is, in my view, simply a particular type of investigative detention… On this approach, the individual is "detained" within the meaning of section 10(b) but given the nature of the lawful police investigative power, he does not have a right to counsel. Adopting the further refinements of the roadside cases, he can be questioned and his answers may provide lawful grounds for further search and/or arrest, but his answers cannot be admitted for substantive use against him at trial…
>
> On either approach, there will be no violation of section 10(b) by failing to inform the detainee of his right to counsel at the stage of lawful investigative detention. [references omitted, paras. 29-33]

Exclusion of Evidence

Although Justice Duncan found no violation of the right to counsel, the evidence was excluded on the basis of the arbitrary detention and unreasonable searches. In excluding the evidence, he noted:

> The very existence of a judge-made power of investigative detention has caused some controversy and concern – even more so an accompanying power of search… Having recognized those powers, the higher Courts have demonstrated a trend to underline and enforce the limits through exclusion of evidence where those limits have been ignored or surpassed…[references omitted, para. 39]

Complete case available at www.canlii.org

Note-able Quote

Do or not do. There is no try—Yoda

LAST DRINK INQUIRY NOT REQUIRED

R. v. Szybunka, 2005 ABCA 422

Police stopped the accused during the course of a Check-Stop program after seeing him drive from a nightclub parking lot. The officer formed a suspicion the accused was impaired because his eyes were red and there was an odour of alcohol. The officer made an approved screening device demand and the accused failed. The officer then formed reasonable and probable grounds to believe he was impaired. The accused was arrested and read the breath demand. He subsequently provided samples of 160 mg% and 150mg%, both over the legal limit. During the tests, the accused told the technician he had his last drink 5 minutes before he was stopped.

At trial in Alberta Provincial Court the accused argued that the officer did not have reasonable and probable grounds for the demand because he did not satisfy himself that any alcohol had been consumed within 15 minutes of the roadside test. By not asking the accused if he had consumed alcohol within the preceding 15 minutes, it was contended that the officer could not rely on the "fail" reading to support his grounds. The trial judge, however, found there was no obligation on the police to ask about the time of a last drink or to wait 15 minutes unless the officer knew he had recently consumed. Judge LeReverend found the officer had reasonable and probable grounds and the breathalyser tests were admitted. He was convicted of driving over the legal limit[4].

The accused appealed to the Alberta Court of Queen's Bench submitting that the officer's failure to not make inquiry into the time of the accused's last drink was fatal to the officer's reasonable and probable grounds to make the breathalyzer demand. Justice Agrois, in dismissing the appeal, held that "waiting 15 minutes is not mandatory unless the investigating constable has reasonable and articulabe reason to believe the accused has consumed alcohol within that time and knew the results of the approved screening device could not be relied on."[5]

The accused then sought leave to appeal before the Alberta Court of Appeal again arguing that the officer failed to take steps to ensure the screening tests was accurate and that the police are required to make enquiries as to the recent consumption of alcohol. In dismissing the application, Justice Berger, in chambers, stated:

> In my opinion, the decision of the Supreme Court of Canada in R. v. Bernshaw…is dispositive of the present application. In Bernshaw, the court held that the evidential testing of motorists represents a search and seizure within the meaning of s. 8 of the Charter and must be based on objectively verifiable reasonable and probable grounds. The thrust of the [accused's] submission is that the failure of the investigating officer to comply with his training, which requires that he wait 15 minutes following a suspect's last alcoholic drink before administering a screening test, takes this case outside the ambit of R. v. Bernshaw. I do not agree. Nor do I agree with the [accused's] contention that it is arguable, in the circumstances of this case, that it is incumbent upon an investigating officer to inquire as to when the suspect consumed his last alcoholic beverage.
>
> The central inquiry is whether there is any evidence which might have caused the investigating constable to question when the [accused] had his last drink. Absent such evidence, there is no requirement that the investigating constable either determine when the last drink was consumed or defer administration of a screening test for 15 minutes. Sopinka, J. in Bernshaw, speaks of "credible evidence to the contrary", that leads an officer to believe that the suspect may have had a drink in the preceding 15 minutes.

[4] See R. v. Szybunka, 2004 ABPC 52

[5] See R. v. Szybunka, 2005 ABQB 686

In the case at bar, the trial judge found that there was no such evidence, and stated that the constable's observation of the [accused] driving out of the parking lot did not equate with knowledge that he had consumed an alcoholic drink just prior to leaving. Reasonable grounds to require that a suspect submit to a screening device are capable of being negated if the officer knew or was wilfully blind to the proposition that the test to be administered might be unreliable. Leaving the parking lot of a bar does not satisfy the test. The actions of a suspect prior to departure from the bar may well be the subject of conjecture and speculation, but if not borne out by credible, cogent evidence, constitutes an uncertain foundation to contend that the constable knew, or ought to have known, that the screening test results would be unreliable. Indeed, it might well be argued that, given the constable's training, the fact that he did not question the [accused] as to when he had his last drink, evidences a lack of concern regarding the reliability of the ensuing screening test results. On the other hand, if the question had been put, it might well be argued that the reliability of the screening test results was a live issue in the constable's mind.

As to the [accused's] advice to the technician (that he stopped drinking at 11.00 p.m.), the trial court must consider the information available to the officer at the time of the breath demand, and decide whether the officer subjectively believed that the accused's ability to drive was impaired by alcohol, and whether that subjective belief meets the objective standard of reasonableness. I agree with the Crown that in applying the objective test, the trial court must consider only the information available to the officer at the time that he formed his opinion; the grounds are not invalid simply because the officer relied on information which is ultimately proven to be wrong… Of course, it is always open to an accused to challenge the reliability of the tests and to question their probative value.

… In my opinion, the evidence establishing the contention that the [accused] had consumed a substance which would skew the results of the screening test, is not, in this case, manifest. Accordingly, on the authority of R. v. Bernshaw…there was no requirement that the investigating officer wait a period of time to ensure that the screening test results were accurate. Nor was the constable required to inquire when the [accused] last consumed alcohol in order to ensure an accurate test. [paras. 7-11]

Complete case available at www.albertacourts.ab.ca

ENTRY ONTO PRIVATE DRIVEWAY LAWFUL: OBSERVATIONS ADMISSIBLE

R. v. Arnett, 2005 ABPC 246

Police responded to a call about a suspicious vehicle driving slowly around a neighbourhood with its windows down and music blaring. The police attended to the area and found a car matching the description driving 25 km in a 50 km zone. The police followed it and saw it roll through a stop sign without stopping. The police emergency lights were activated and the accused drove about 40 yards before pulling into his driveway.

The officer noted the accused had a strong smell of alcohol on his breath, red, glassy eyes, uncoordinated slow and deliberate motor skills and speech, and he was unfocussed. The officer asked him to get out of the vehicle. He was unsteady on his feet, his movements were slow and deliberate, and he held onto the car door so he wouldn't fall. The officer formed the opinion the accused was impaired and he was arrested and given his *Charter* rights. While back at the police station, 42 minutes after the arrest, the officer read the breath demand to the accused. He subsequently provided two samples of his breath.

At trial in Alberta Provincial Court on charges of impaired driving and over 80mg% the accused

submitted that his rights under the *Charter* were breached because the police entered his private property to detain him and conduct a search, without a warrant and without reasonable grounds, in circumstances that did not justify an arrest without a warrant. Furthermore, the police did not make the breath demand forthwith or as soon as practicable. Nor did they re-inform him of his right to counsel when making the breath demand, some 42 minutes after his arrest.

As for whether the accused's ss.8 and 10(b) rights were violated because of the 42 minute delay, Judge Daniel found the delay was too long and without good reason. Because of this delay, "the accused should have been reminded of his s.10(b) *Charter* right and offered the opportunity to contact counsel after the Breath Demand had been read to him at the station." As well, the breath demand was not read "forthwith or as soon as practicable" as required by s.254(3) of the *Criminal Code* resulting in an unreasonable search and seizure of the accused's breath. As a result of these violations, the breathalyzer certificate was excluded under s.24(2).

However, Judge Daniel found all of the officer's observational evidence obtained from the traffic stop admissible because there were no *Charter* breaches respecting the police entry onto the accused's driveway. The judge rejected the argument "that as soon as the accused drove over his property line, that he thereby safely ensconced himself in legal sanctuary," stating:

> …Firstly, the police had personally witnessed a violation of the Traffic Safety Act. They were under a legal duty to stop and detain the violator so they could deal appropriately with him. They had reasonable and probable grounds, both subjectively and objectively, to do so. The accused was under a legal obligation to immediately stop and identify himself. There was a clear nexus between the individual to be detained and the offence; the events were continuous. It was necessary to detain the accused so the police could perform their legally recognized statutory duties. This entailed stopping him and requiring him to identify himself and produce his license, registration and insurance as a prelude to issuing the ticket for failure to stop at a stop sign.
>
> The police signalled their intent that he should stop and identify himself by approaching within ten yards of the back of his motor vehicle and activating the overhead lights on their marked police van. They pursued him in this manner for about forty yards before he stopped in his driveway. If he had stopped on the roadway or in someone else's driveway no issue of private property or immunity would have arisen. Just because he happened to stop in his own driveway it makes no logical or common sense for him to suddenly acquire a sanctuarial immunity from legal prosecution and his obligations under the Traffic Safety Act.
>
> Secondly, I find the police were in 'hot' or 'fresh' pursuit. There does not have to be a high speed or lengthy chase for the police to be in 'hot' pursuit. The accused could not have been in any doubt whatsoever that the police wanted him to pull over. He chose not to stop immediately and kept driving. Granted, he did not travel a long distance…, he did not speed up, go through any more traffic stop signs or exit his vehicle and flee inside his home, but the fact remains that he did not stop immediately when required to do so. The police conducted the pursuit with reasonable diligence such that the pursuit and capture along with the commission of the offence can be considered as forming part of a single transaction. By exiting their police vehicle and going to the accused's vehicle, they were simply continuing the ongoing pursuit on foot. Since he had not stopped when required, they had an option to arrest him without a warrant for failing to stop for a police officer.
>
> Thirdly, at common law, the police have a right to enter private premises to make an arrest when they have a warrant for arrest, to prevent a crime from being committed, when they are in hot pursuit having either witnessed

an offence or have arrived after an offence has been committed and having seen the offender flee the crime scene. Police can also enter private property to conduct an investigation in other circumstances without a warrant… The power is not limited to indictable offences. As was held in the Macooh case it can apply to Provincial offences where there is a right of arrest. …By entering onto [the accused's] driveway, the police were simply continuing a pursuit already begun. They did not know it was his driveway, nor was there any way could they have been reasonably expected to know.

Fourthly, the accused had no reasonable expectation of privacy. He remained in his car, in which there is a lesser expectation of privacy than in a home. The accused certainly must have expected the police to attend at his driver's side window to follow up with their traffic stop. To that end he waited in the car for them. The window was rolled down and the police could easily converse with him. When the constable did ask for his driving particulars as he was legally entitled to do, he could not then ignore the signs of impairment immediately apparent to him. The accused did not hide in his car with the windows rolled up and the doors locked. He did not emerge from his car and order the police off his property. He did not point to any 'no trespass' signs because there weren't any. There was no reason for the police to assume this was his driveway or that he had any reasonable expectation of privacy upon it. His actions belied any expectation of privacy under all the circumstances. In this case, when balancing the invasion of individual rights with the need for police to fulfill their legal duties, the minimal intrusion onto this accused's driveway is reasonable in the context of the public purpose of the police fulfilling their lawful duties…

Fifthly, this was a driveway and not a home. The vehicle was in plain view, as was the accused. Any interference with the accused's property rights was minimal. There is an implied license for the police or anyone else on legitimate business to enter onto the driveway of a private residence…. The police were respectful and polite, acting in the course of their statutory duty to investigate, apprehend and lay charges. They did not draw their weapons. The accused was also respectful and cooperative. No violence was used or threatened….

Sixthly, there are a number of public policy reasons why the accused should not expect sanctuary from prosecution in all the circumstances of this case:

a) A criminal should not be immune from arrest in his own home or driveway.
b) There are occasions when a person's privacy interests must yield to the public interest in executing due process against an offender.
c) If police officers had to obtain a warrant in the instant circumstances, it would likely be impossible to identify their target – perhaps neighbours would have to be awoken and inconvenienced to see if they could identify the accused. While the police are engaged in that kind of inquiry, the offender could slip away and the opportunity for identification could be lost. Even with his identity confirmed a justice of the peace would have to be found to execute an arrest warrant. Valuable police time would be wasted and by the time the police officer got back with the warrant, the offender would likely have vacated the scene.
d) If fugitives think they can escape prosecution merely by fleeing to their own driveway, chases that endanger the public and property are likely to ensue. Flight may result in loss of evidence. An offender's flight should not be rewarded with immunity from prosecution. [references omitted, paras. 25-31]

Even though the certificates of analysis were inadmissible for the over 80mg% charge, the accused was convicted of impaired driving based on the officer's admissible observations during the lawful traffic stop.

Complete case available at www.albertacourts.ab.ca

CHARTER ARGUMENT TOO LATE

R. v. Thibodeau, 2005 NBCA 81

A police officer patrolling a municipal building parking lot in the evening saw two individuals between two cars escape behind a building. The officer went behind the building and saw a person speed off on an all-terrain vehicle (ATV). The driver of the ATV tried to pass through a fence opening but got stuck. Its wheels continued to spin and make holes in the ground. The officer approached, asked the driver to turn the ATV off, remove his helmet, and produce identification. The constable detected a strong odour of alcohol on the accused's breath, noted his eyes were glassy and bloodshot, and that his speech was somewhat slurred. The accused was advised of his *Charter* rights and given the breath demand, which subsequently resulted in samples over the legal limit.

At trial in New Brunswick Provincial Court the accused was convicted of operating a motor vehicle while over 80mg% when the trial judge ruled that the officer had an articulable cause to stop and question the accused under the circumstances because he was causing damage while trying to free the ATV. The accused, however, appealed to the New Brunswick Court of Queen's Bench.

Justice McIntyre of the New Brunswick Court of Queen's Bench agreed that the officer had an articulable cause to stop and question the accused. Furthermore, Justice McIntyre found the police had another reason to approach the accused:

> Lastly, there are instances when a peace officer is entitled, and is in fact even under a duty, to approach an individual without articulable cause to believe he is involved in criminal activity. One such instance is when a peace officer decides to lend assistance to a person in distress. If the officer's observations give him reasonable grounds to believe that the individual is committing an offence under section 253 of the *Code* or that he committed such an offence within the past three hours, he has cause to ask the individual to provide a breath sample for analysis. In my opinion, even if the constable in the case at bar had not seen the accused damage others' property, he had cause to approach the accused for the sole reason that his vehicle was stuck and he needed help. However, [the constable] specifically stated that he stopped the [accused] because he was causing damage to the property of others. Thus, he would probably not otherwise have felt the need to approach or stop the [accused][6]. [para. 8]

Despite this finding, Justice McIntyre excluded the officer's testimony respecting his articulable cause because the Crown never disclosed before the trial what the articulable cause was that prompted the officer to stop and question the accused. It was not in the officer's notes and, as the accused contended, hearing it for the first time at trial prevented him from preparing to make full answer and defence. Since there was no articulable cause to stop the accused (which had been excluded) the breath demand was unlawful and an acquittal was entered.

The Crown then appealed to the New Brunswick Court of Appeal arguing, among other grounds, that the trial judge erred by allowing the accused to rely on a ground of appeal not raised in the notice of appeal and by allowing the accused to plead a *Charter* violation not raised at trial. In a 2:1 judgment, the majority agreed with Crown, set aside the acquittal, and affirmed the conviction. Justice Deschenes, with Justice Richard concurring stated:

> After learning, during cross-examination of the police officer, that the latter had not indicated in his notebook that he had stopped and questioned [the accused] because he was causing damage to municipal property, [the

[6] See R. v. Thibodeau, 2004 NBQB 253

accused] chose not to raise an issue that he now claims is a breach of the prosecution's duty of disclosure. Assuming, for argument's sake, that the information identified by the appeal judge should have been disclosed before the trial, [the accused] was nonetheless aware, during his trial, and even before the prosecution closed its case, of all the circumstances based on which the police officer stopped and questioned him. Assuming, for the purposes of this discussion, that a case has been made against the prosecution for not disclosing the information in question before the trial, at the most this would amount to a *late* disclosure, not a failure to disclose. If this *late* disclosure violated his right to make full answer and defence, it was up to [the accused] to break his silence before the trial judge and bring a motion for the remedy that he considered appropriate under s. 24(1) of the *Charter*. It was up to [the accused] to convince the trial judge that his right to make full answer and defence had been violated and that this violation of his constitutional right could only result in the exclusion of the evidence and his acquittal. In addition to failing to fulfil his duty to assert his right to make full answer and defence, [the accused] continued cross-examining the police officer, and testified in his own defence.

If [the accused] had made a timely motion with respect to this issue instead of remaining silent about the whole matter, the trial judge would have had to rule on questions which were raised for the first time on appeal, and for which there is no factual basis.

The trial judge would first have had to consider the information disclosed to [the accused]. As the Crown prosecutor has argued, even though the police officer did not enter in his notebook all the circumstances that caused him to stop and question [the accused], this information may have been found elsewhere in the file that was disclosed to him. Since the question was never raised at trial, the prosecution never had the opportunity to reply and the trial judge did not rule on it. Ultimately, [the accused] has never shown that the prosecution failed in its duty to disclose anything.

Moreover, even if the trial judge had found that the right to disclosure had been violated in this case, [the accused] would still have had to show that this violation infringed his right to make full answer and defence. And assuming that [the accused] had been successful at this stage, the trial judge would still have had to choose the remedy that he considered appropriate in the circumstances. Among other forms of relief, he might have granted an adjournment. Since the trial judge was never called upon to decide these questions (because they were never raised), some of the remedies that would have been appropriate are obviously no longer available following a conviction.

In light of this, the summary conviction appeal court was not able to apply the preliminary test in *Stinchcombe*, namely whether there was an actual violation of [the accused's] right to disclosure, notwithstanding the fact that certain information was not in the police officer's notebook. In my opinion, the general rule that appellate courts do not allow a question to be raised for the first time on an appeal applies to the instant case and the appeal judge erred in law in allowing [the accused] to argue the defence at issue before him. …

In my opinion, when an accused standing trial believes that the prosecution has failed to comply with its duty to disclose, he must break his silence and bring the issue to the court's attention so that the court can deal with it. The accused cannot remain silent on the question, and then attempt for the first time, on an appeal, to raise an alleged breach of the duty to disclose….

As the appeal judge stated in his decision, it is true that the Crown prosecutor did not object when this new ground of appeal was raised extemporaneously for the first time before him. However, even if one assumes that the prosecution had a duty to object in the instant case, the appeal judge had no factual basis on which to rule on the question,

which had to be decided at trial. [references omitted, paras. 15-21]

Justice Rice, however, disagreed with his colleagues. He stated:

> The appeal judge had the jurisdiction and the duty to intervene if he believed that the accused's *Charter* right had been violated. In my opinion, it is reasonable to conclude that the police officer, who formed suspicions regarding the accused as the latter was moving around the area being patrolled, decided to stop and question the accused without having reasonable grounds to do so. He abandoned this plan in the belief that the accused would use a path that was inaccessible to him. The grounds involving damage to others' property, which he advances as a basis for stopping and questioning the accused (and which were not disclosed to the accused before the trial), should have been disclosed before the trial so they could be investigated and questioned. In view of the importance of this *Charter* issue, I cannot find that the failure to raise it at a given stage of the proceedings would result in the setting aside of this ground of appeal… [para 2]

Complete case available at www.canlii.org

B&E PRESUMPTION CONSTITUTIONAL

R. v. Singh, 2005 BCCA 591

After awaking, the complainant found the accused inside an apartment in the early morning hours walking towards the door. The complainant grabbed him and called 911. The accused was subsequently apprehended by police outside the building after briefly eluding them. He was convicted in the Supreme Court of British Columbia on a charge of break and enter with intent to commit an indictable offence. The trial judge concluded the accused did not rebut the presumption found in s.348(2)(a) of the *Criminal Code*, which provides that evidence an accused "broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein."

The accused appealed his conviction to the British Columbia Court of Appeal arguing that his s.7 *Charter* right had been violated because the *Criminal Code* presumption breached the tenets of fundamental justice by creating the possibility that an innocent person might be convicted. Justice Hall, authoring the unanimous appeal court judgment, disagreed. Relying on and applying the reasoning of other court decisions, he found that the presumption did not violate s.7 because break and enters are epidemic, the clearance rate is low, and the prosecution should have the benefit of this "evidentiary assist" presumption. The appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

DIRECT OBSERVATION OF DRIVING NOT NECESSARY FOR ASD DEMAND

R. v. Campbell, 2005 BCCA 619

A witness called police after seeing a Lexus operated by the accused driven in an erratic manner including weaving in its lane and striking the curb at slow speeds, as well as running a red light and stop sign. The witness saw the Lexus park and the accused exit and then get into a Jeep as a passenger. The Jeep was subsequently stopped in the parking lot by police and the officer noted the accused had a flushed face, watery eyes, and a smell of liquor. When asked for her driver's licence, the accused retrieved it from the locked trunk of her Lexus. The officer formed a suspicion the accused had alcohol in her body and a roadside screening test was given. She failed, a breath demand was made, and the accused provided samples of her breath over the legal limit. She was convicted of

over 80mg% in British Columbia Provincial Court and her conviction was affirmed on appeal to the Supreme Court of British Columbia.

The accused appealed to the British Columbia Court of Appeal arguing that a police officer making a demand under s.254(2) of the *Criminal Code* must actually see the subject of the demand in care and control of the vehicle when the demand is made. Section 254(2) of the *Criminal Code* states:

> s.254(2) *Criminal Code*
> Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

Justice Huddart, for the unanimous court, dismissed the appeal. In her view the demand was valid and there was no need for the officer making the demand to make it only when a person is actually seen driving or in care and control. In holding that the trial judge did not err, Justice Huddart stated:

> To establish an offence for refusing to give a sample of breath under this section, the Crown must establish the peace officer who made the demand had a reasonable suspicion the person in question had alcohol in his body at the time of the demand, and that he had been operating a motor vehicle or had the care or control of a motor vehicle.
>
> .....
>
> Virtually all the [accused's] authorities implicitly or explicitly adopt this understanding of the application of s. 254(2) as do those submitted by the [Crown]. The words "is driving" or "has the care or control" are to be given some past signification. The cases differ in outcome as a result of factual findings as to whether the Crown has established on the evidence either that the accused's driving occurred within a time frame reasonably contemplated in giving "is" a past tense interpretation, or that the accused had care or control at the time of the demand.
>
> I can see no error in the conclusion of the summary conviction court appeal judge that in this case the evidence supported a finding that the demand was made as soon as reasonably practicable by the…police officer, just as it would have supported a conclusion that the accused was in care or control of her motor vehicle at the time of the demand.
>
> It is with this understanding of s. 254(2), the question of law posed to this court must be answered. The [accused] suggests that a demand pursuant to s. 254(2) cannot be made unless the demanding officer has direct knowledge of the driving or care or control of a motor vehicle. In R. v. MacPherson (2000), 150 C.C.C. (3d) 540 (Ont. C.A.), Charron J.A. (as she then was) explained for the court that a valid demand requires only that a police officer reasonably suspect the accused has alcohol in his or her body. The Crown must prove the accused is "driving" or "has the care or control" at the time of the demand, but may do so through means other than the officer's knowledge or observation.
>
> I accept those propositions. In this case the…police officer had information from [a witness], which led him to believe that [the accused] had been driving her vehicle in the previous few minutes. He observed signs of "liquor" consumption, and he watched as she opened the trunk of her car with a key and retrieved from it her purse and driver's licence. That evidence justified the reasonable suspicion he formed that [the accused] had alcohol in her body while recently driving and not having surrendered the care and control of her motor vehicle. His direct observation of her driving was not required. [paras. 11-16]

Complete case available at www.courts.gov.bc.ca

INCIDENTAL SEARCH DOES NOT REQUIRE WARRANT

R. v. Munro, 2005 BCCA 610

An undercover police officer who suspected the accused might be transporting drugs requested another officer stop her. The second officer stopped the accused for speeding as she drove along a highway and arrested her for driving while prohibited. The officer could also smell a moderate odour of vegetative marihuana in the car. The officer read the accused her rights and placed her in the police car.

The vehicle was impounded under s.104 of the *Motor Vehicle Act* and searched by a police dog at the roadside. In the car police found a gym bag containing four vacuum-sealed bags with marihuana. The accused was then arrested for possession of marihuana and taken to the police station. Other bags found in the vehicle were also taken to the police station, one of which was found to contain cocaine.

At trial in British Columbia Supreme Court the accused was acquitted on a charge of possession of cocaine for the purpose of trafficking. The trial judge ruled that the search of the vehicle was warrantless and therefore unreasonable, even if the officer had reasonable grounds to arrest the accused. There were no exigent circumstances that made it not feasible to obtain a search warrant. In the judge's view the *Charter* violation was serious and the evidence was excluded under s.24(2).

The Crown appealed to the British Columbia Court of Appeal arguing that the trial judge failed to properly analyze the legal issues pertaining to the admissibility of the evidence. Justice Low, writing for the unanimous appeal court, agreed with the Crown's submission. The trial judge erred in restricting his approach to a requirement that the Crown prove it was not practicable to obtain a search warrant through the existence of exigent circumstances.

Although "the police officers could have obtained a search warrant and had time to do so…there is no requirement in law that a search warrant be obtained if the search is conducted incidentally to the lawful arrest of the suspect for any of three reasons; to ensure the safety of the police and the public; to protect evidence from destruction; or…for 'the discovery of evidence which can be used at the arrestee's trial'," said Justice Low. In this case, the trial judge did not consider the need to *discover* evidence in his analysis. Since the trial judge did not consider the appropriate factors, the appeal was allowed and a new trial was ordered.

Complete case available at www.courts.gov.bc.ca

EXPERT EVIDENCE BASED ON DISBELIEVED TESTIMONY REJECTED

R. v. Boucher, 2005 SCC 72

The accused was charged with driving while over 80mg%. He had provided two samples of his breath to police resulting in readings of 93mg% and 92mg%. At trial in Quebec Municipal Court the accused testified he drank two large beers during the two to three hours preceding his arrest. He also called an expert who testified that the breathalyzer readings did not correspond with the level of alcohol expected of a person with the accused's physical characteristics and the amount he claimed he drank.

In the expert's view, the accused's blood alcohol level should have been 60mg%. A reading in the 90mg% to 95mg% would require the accused drinking twice as much as he said. Furthermore, the expert stated that if the accused had drank just before his arrest, the level recorded on the breathalyzer might have been different that at

the time of driving because the alcohol would not yet have been absorbed at the time of arrest, but would have been absorbed at the time of testing. The expert, however, relied on statistical averages and did not provide evidence about the accused's alcohol tolerance.

The trial judge found the accused's testimony not credible. Since his testimony was not credible it could not serve as a basis for the expert's evidence. Thus, there was no evidence to the contrary that could rebut the statutory presumption found in the *Criminal Code*. He was convicted.

The accused appealed to the Quebec Superior Court arguing the trial judge erred. In the Superior Court judge's view, the evidence as a whole may still raise a reasonable doubt concerning whether the accused's blood alcohol level exceeded the legal limit even if his evidence about how much he drank was disbelieved. In this case, based in part on the absence of physical symptoms, the Superior Court judge found the accused raised a reasonable doubt. He was acquitted.

The Crown appealed to the Quebec Court of Appeal. Although the three judges wrote separate opinions, the acquittal was upheld. The Crown then appealed to the Supreme Court of Canada arguing that the trial judge did not err in rejecting the expert's testimony because it was based on the accused's disbelieved testimony.

Justice Deschamps, with four other justices concurring, first reviewed the presumptions found in s.258 of the *Criminal Code*. She stated:

> Where samples of an accused's breath have been taken pursuant to a demand made under s. 254(3) Cr. C., Parliament has established separate presumptions in s. 258(1) Cr. C. to facilitate proof of the accused's blood alcohol level: two presumptions of identity and one presumption of accuracy. According to the presumption of identity in s. 258(1)(c) Cr. C., the accused's blood alcohol level at the time when the offence was alleged to have been committed is the same as the level at the time of the breathalyzer test. According to s. 258(1)(d.1) Cr. C., where the alcohol level exceeds 80 mg at the time of the test, there is a presumption that it also exceeded 80 mg at the time when the offence was alleged to have been committed. The presumption of accuracy in s. 258(1)(g) Cr. C. establishes prima facie that the technician's reading provides an accurate determination of the blood alcohol level at the time of the test. These presumptions have certain similarities, but they remain distinct presumptions. [para. 14]

And further:

> The presumption of identity in s. 258(1)(c) Cr. C. can be rebutted by evidence that tends to show that the blood alcohol level at the time when the offence was alleged to have been committed was different from the level measured at the time of the breathalyzer test…. Thus, in St. Pierre, the accused consumed two miniature bottles of vodka after being arrested but before taking a breathalyzer test, and this fact was capable of rebutting the presumption that the blood alcohol level measured at the time of the test was the same as the blood alcohol level at the time she was driving her vehicle.
>
> Such evidence to the contrary adduced to rebut the presumption of identity does not deprive the prosecution of the benefit of the presumption that the certificate accurately states the blood alcohol level at the time of the breathalyzer test (the presumption of accuracy). The Crown can still prove that the accused's blood alcohol level at the time when the offence was alleged to have been committed exceeded 80 mg; one piece of evidence would then be the reading taken by the breathalyzer, the accuracy of which is not in dispute. Additional evidence would be needed, however, to prove the blood alcohol level at the time when the offence was alleged to have been committed.
>
> Evidence to the contrary that is adduced to rebut the presumption of accuracy in s. 258(1)(g) Cr. C. must tend to show that the

certificate does not in fact correctly reflect the blood alcohol level at the time of the breathalyzer test. This evidence must raise a reasonable doubt about the accuracy of the breathalyzer result.

Shortly after St. Pierre, Parliament amended the Criminal Code to add s. 258(1)(d.1) Cr. C., which expands the presumption of identity. According to this new provision, where the accused's blood alcohol level exceeded 80 mg at the time of the breathalyzer test, it will be presumed, in the absence of evidence to the contrary, to have exceeded 80 mg at the time when the offence was alleged to have been committed. The effect of the enactment of s. 258(1)(d.1) Cr. C. was not to change the type of evidence needed to rebut the presumption of identity in s. 258(1)(c) Cr. C. or the presumption of accuracy in s. 258(1)(g) Cr. C., but to reinforce the presumption of identity. [paras. 19-22]

In establishing evidence to the contrary, an accused has no burden of proof to meet in rebutting any of these presumptions. Rather, if a judge has a reasonable doubt that the blood alcohol level recorded was not the same at the time of driving, the level did not exceed 80mg%, or the certificate did not accurately reflect the blood alcohol level, then the presumptions do not apply.

In this case the judge did not believe the accused and therefore the expert's calculations were of no assistance in "neutralizing" the presumption. As for the lack of physical indicia of impairment raising a reasonable doubt as to the application of the presumption, Justice Deschamps wrote:

Evidence that there are no symptoms is indeed very relevant to the charge of impaired driving. In fact, this explains why, when the prosecution closed its case, it asked the judge to acquit [the accused] on that charge. The situation is quite different for the charge of driving with a blood alcohol level over 80 mg. The offence of driving with a level exceeding 80 mg does not require proof of impairment. The absence of symptoms of impairment is generally not sufficient to constitute evidence to the contrary that can be used to rebut the presumption of accuracy. This is because a lack of evidence of the usual symptoms of impairment, such as staggering and slurred speech, does not provide information about the actual blood alcohol level. Symptoms such as these usually accompany extremely high blood alcohol levels. Conversely, very low levels are generally consistent with an absence of symptoms. An absence of symptoms is therefore not significant in itself if the court does not know the accused's level of alcohol tolerance. [para. 33]

Nor did the low breathalyzer readings provide evidence to the contrary. She held:

…I find it difficult to see how the fact that the alcohol levels were 93 mg and 92 mg…could constitute evidence that the breathalyzer result was inaccurate. How can the results of 93 mg and 92 mg show that the result itself was inaccurate? The result is precisely the figure that the accused claimed was inaccurate. To achieve his goal, he should logically have tried to discredit that figure, not to use it. The result cannot be both evidence and evidence contrary to that evidence. [para. 35]

The majority set aside the acquittal and restored the conviction of over 80mg%. The other four justices would have allowed the appeal but ordered a new trial because they felt the trial judge erred in assessing and rejecting the accused's testimony.

Complete case available at www.scc-csc.gc.ca

Note-able Quote

Do all the good you can, by all the means you can, in all the ways you can, in all the places you can, at all the times you can, to all the people you can, as long as ever you can —Phaedrus

Coming Soon
(see p.40)

WARRANT BASED ON PLAIN VIEW OBSERVATIONS REASONABLE

R. v. Jackson, 2005 ABCA 430

After a stabbing victim had been found dead in his bunkhouse, police requested camp security help identify occupied rooms so police could obtain the names of possible witnesses. As well, the police wanted the bunkhouse evacuated to protect the crime scene and prevent contamination. One of the security officers told police that the accused was in his room. A police officer went to the room and knocked on the door, which was left ajar. The officer asked if he could come in and the accused said, "Sure".

The officer entered the small room, told the accused why he was there, and asked his name, date of birth, and which shift he last worked. The accused answered each question and also told the officer he sold things around the camp, pointing to a cooler on the floor he said he sold water from. Beside the cooler the officer saw a pair of boots—one on its side—with a similar tread pattern as one seen in blood in the victim's room. The officer saw a second pair of boots under a desk and asked the accused if he could look at both pairs. The accused said "Yes".

One of the boots by the water cooler with the similar tread pattern also had a moist dark stain on its toe which the officer believed was blood. The accused was then arrested for first degree murder and advised of his right to a lawyer. During the one hour transport to the police detachment, the accused was not questioned but made spontaneous remarks, including knowing the identity of the victim even though it had not been disclosed to him.

Although the police did not seize the boots, they subsequently obtained a search warrant and it was later determined that the boots with the similar tread pattern had blood on them that matched the DNA of the victim. As well, blue jeans and a shirt belonging to the accused had blood on it matching the victim's blood. At trial in the Alberta Court of Queen's Bench the accused argued, among other things, that the warrantless search when police entered his room, saw the boots, and examined them was unreasonable.

The trial judge, however, found the search was reasonable under s.489(2) of the *Criminal Code* and the common law plain view doctrine. The officer was lawfully present in the accused's room by express consent, he was in the lawful execution of his duty in evacuating the bunkhouse to secure the scene, the boots were inadvertently discovered, and it was immediately apparent by the tread pattern the boots might be evidence. The accused was convicted of second degree murder.

The accused appealed to the Alberta Court of Appeal, in part, contending that the trial judge erred in her analysis of the plain view doctrine and that his rights under s.8 of the *Charter* were violated. The court, however, disagreed. The legal basis for the inspection of the accused's boots in his room was well established and the trial judge did not err. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

FAIL RESULT CANNOT BE USED FOR GROUNDS UNLESS DEVICE 'APPROVED'

R. v. Arsenault, 2005 NBCA 110

A police officer saw the accused leave a tavern, stagger across the street, drop his keys, and leave in his truck. The officer followed the accused for about one kilometre and stopped him to check documents and investigate his suspicion regarding sobriety.

The officer detected an odour of alcohol on the accused's breath and noted his eyes were glassy. The officer demanded the accused provide a breath sample into an approved screening device and he failed. A breathalyzer demand was then made and the accused provided samples over the legal limit.

At trial in New Brunswick Provincial Court the officer testified that he was qualified to operate an approved screening device and that it was operating properly, but he described it as a "Draeger"—which is a manufacturer of an approved screening device[7]. The trial judge ruled that the Crown failed to establish that the device used was an approved screening device under the *Criminal Code* and that the fail reading could not be used to form reasonable grounds for the breathalyzer demand. Without the fail reading, the officer did not have the requisite grounds for the breath demand thereby making the seizure of the accused's breath unreasonable under s.8 of the *Charter*. The certificate was excluded and the accused was acquitted. An appeal to the New Brunswick Court of Queen's Bench was dismissed.

The Crown appealed to the New Brunswick Court of Appeal arguing, in part, that the lower court erred in finding that the Crown must prove the screening device was approved under the *Criminal Code*. In holding that the Crown did bear the burden of showing the device used by the police officer was approved under the *Criminal Code*, Justice Deschenes, for the unanimous court, stated:

> … In my view, unless there is some evidence to establish it, a court is not entitled to assume that a screening device used by a peace officer in collecting a breath sample is an approved screening device. That evidence is necessary to establish the statutory authority under which the breath sample is obtained. Peace officers are only entitled to require drivers to provide samples for testing on an approved screening device and the approved screening device is the only one that in fact can be used to collect the sample. The finding by the trial judge that the Crown had failed to establish that [the accused's] breath sample had been collected by using an approved screening device simply means that the fail result was not obtained within the legislative scheme envisaged by the Code. The "Draeger" machine used was not an "approved screening device" as defined by the Criminal Code and regulations. Unlike the results from an "approved screening device" the results obtained in this case cannot be presumed to be reliable. Only a "fail" reading on an "approved screening device", as defined by the Code, can provide the necessary reasonable and probable grounds. Where the particular screening device used has been approved under the statutory scheme, an officer is usually entitled to rely on its accuracy. The test results on the "Draeger" provided a result that has no meaning within the framework of the section. [para. 21]

And further:

> In the case before us, the demand under s. 254(2) was unauthorized and unlawful…because the device to be used by [the officer] and which was in fact used to collect the fail result, was not proved to be an approved screening device. In my view…I do not see how the fail results in the case before us can be admissible to establish honest belief, considering it was obtained from a device not proved to be an approved device. Accordingly…I conclude, as did the trial judge and the appeal court, that [the officer] was not entitled to rely upon the fail result to form the honest belief required for the breathalyzer demand which followed. Accordingly, the trial judge and the appeal judge who agreed with him did not err in law in refusing to consider such results in deciding the issue of honest belief.
>
> I reach this conclusion despite a long list of cases which hold that the question of whether a peace officer holds an honest belief that a person is committing an offence under s. 253 must be measured by the facts as understood by the peace officer at the time when the

[7] See R. v. Arsenault, 2004 NBQB 181

> demand is made. In addition, an honest belief cannot be dependant upon a ruling made during the course of a trial that the Crown has failed to prove that the screening device used to collect the breath sample was an approved screening device. …[A] finding that a peace officer personally held an honest belief that an offence had been committed under s. 253 is not determinative. In fact, regardless of the peace officer's honestly held personal views, the objective component on the question of honest belief must be considered and the honest belief must be justifiable from an objective point of view. The objective test is that a reasonable person, standing in the shoes of the peace officer who made the demand, would have believed that [the accused] committed an offence under s. 253. Again, in dealing with the objective component, the cases hold that the court should not be concerned with the fact that the Crown has failed to prove that the screening device used was an approved screening device and that the function of the court is to look "at the facts known by or available to the peace officer at the time he or she formed the belief" and decide if, viewed from the objective vantage point of the reasonable person, the grounds are justifiable…
>
> …[T]here is an argument to be made that the application of the subjective and objective components to determine the question of honest belief could lead one to conclude that [the officer] held an honest belief in this case. However…[the officer] was not entitled to rely on the fail result as it was obtained by the use of a device not proven to be an approved one. Thus, by applying the objective component to the question of honest belief, there is nothing unusual in finding that, in fact, [the officer] did not have the honest belief required despite [his] genuine personal belief that he had reasonable grounds to make the demand. [paras. 23-25]

Without the fail result, the trial judge concluded the officer did not have sufficient reasonable grounds upon which to base the breathalyzer demand despite the other indicia of impairment. Although another judge may have come to a different conclusion, his finding was not a palpable or overriding error requiring appellant interference. Nor did the fact that the accused complied with the breathalyzer demand render the seizure reasonable. Justice Deschenes held:

> …In this case, the samples were admittedly collected following a demand and without a warrant. Thus, the onus was on the Crown to prove the reasonableness of the seizure. As the Crown failed to establish an honest belief to make the demand, it was therefore unlawful and unauthorized. In such circumstances, because the search and seizure was not authorized by law, it cannot be regarded as reasonable. In my view, the Crown has failed to discharge the onus of establishing reasonableness and the appeal judge was correct in agreeing with the trial judge that [the accused's] right under s. 8 to be secure against unreasonable seizure was violated in the course of obtaining the breathalyzer results. [para. 33]

The breath certificate was inadmissible under s.24(2) of the *Charter* and the Crown's appeal was dismissed.

Complete case available at www.canlii.org

OFFICER LACKS SUBJECTIVE BELIEF FOR SAFETY SEARCH

R. v. Spitale, 2005 BCPC 0586

A police officer saw the accused, who was known to him, sitting on the steps of a building two blocks from a very high drug and prostitution crime area. He had a glass crack pipe in his hand and closed his hand over it as the police approached. The officer advised the accused he was under investigation for possession of a controlled substance and the pipe was removed from the accused's hand. The officer did not see cocaine residue on the pipe. As the officer began a pat down search, the accused removed a plastic bag containing 34 rocks of cocaine from inside the front of his pants. He was arrested for

possession of a controlled substance and $137 was found on him. He was charged with possession of cocaine for the purpose of trafficking.

At trial in British Columbia Provincial Court, the accused applied to have the evidence excluded under s.24(2) of the *Charter*, arguing his rights under s.8 were violated by the search. In addressing whether the search was justified, Judge A. Rounthwaite first examined the validity of the detention. In her view, the detention was justified because the accused was found in a neighbourhood known for drug trafficking and he was in possession of a crack pipe. This was sufficient to detain, but not arrest him.

The removal of the crack pipe from the accused's hand was problematic. The officer testified he had no fear for his or his partner's safety. Although the judge found it would be objectively reasonable to take the crack pipe—it could be broken and constitute a danger—the officer did not have the necessary subjective belief. He said he had no fear for his safety. Rather, he took the pipe to investigate a drug offence. The cocaine rocks were recovered during a search incident to investigative detention—not incident to arrest—thereby breaching the accused's s.8 rights because the search was undertaken to locate evidence, not for safety.

Judge Routhwaite also outlined four guiding principles after reviewing the case law in similar circumstances. She stated:

> …the law is actually quite straight forward on this topic:
>
> 1. Possession of a crack pipe has repeatedly been held to provide reasonable grounds for investigative detention where it occurs in circumstances giving rise to a reasonable suspicion that the individual possesses drugs (e.g. a neighbourhood known for drug use, the officer's experience, the location and behaviour of the individual and others).
>
> 2. Investigative detentions must be brief; police officers must tell detainees the reason for their detention; and detainees are not obliged to answer questions.
>
> 3. During investigative detention officers may conduct a protective pat down search of the detainee where they believe on reasonable grounds that their safety or the safety of others is at risk; however, they may not search the detainee for evidence.
>
> 4. Only where there are reasonable grounds for arrest, viewed subjectively and objectively, may officers arrest and conduct a search incidental to arrest in order to obtain evidence, to prevent escape, or for safety. [para. 15]

Since the accused's rights were violated, the evidence was excluded under s.24(2) because its admission would bring the administration of justice into disrepute. In her concluding comments, Judge Routhwaite stated:

> Evidence should not be excluded to punish the police, but to admit evidence obtained by an officer who, from his testimony, appears to have been ignorant of the legal boundaries of his power to search people, would encourage unlawful activity by police [para. 19]

Complete case available at www.provincialcourt.bc.ca

SAFETY SEARCH INTO ITEM BEYOND ACCESS OF DETAINEE UNREASONABLE

R. v. Mohammed, 2005 BCPC 0593

While responding to a fight in progress arising from a road rage or motor vehicle collision, a constable was flagged down by the accused driving a vehicle matching one of the vehicle descriptions provided. He had a bloody face, chipped tooth

and ripped shirt. He said he was jumped by four to six males and motioned to an intersection about three blocks away. A corporal radioed the constable from the scene of the altercation and reported a handgun was found on the roadway. The constable detained the accused for a weapons investigation, patted him down, and asked if there were any weapons in the car. The accused opened the door and the constable visually inspected the car. The officer reached for a CD case seen inside the passenger compartment, but the accused protested. The CD case was similar in weight and size to that which could contain a weapon. A struggle resulted; the accused was handcuffed and put in the rear of the police car. The corporal attended to the vehicle and opened the CD case, finding cocaine.

At trial in British Columbia Provincial Court the corporal testified, in part, to the following:

- Upon finding the handgun, the seriousness and risk of the call had risen and in her experience where there is one weapon there may be more;
- She believe she could "clear a suspect and vehicle for weapons" under these circumstances;
- Although the accused was patted down and handcuffed, he may be released and again have access to his car;
- She did not have reasonable and probable grounds to apply for a search warrant

The accused argued that his rights under ss.8 and 9 of the *Charter* were breached. First, he submitted that the investigative detention was arbitrary because there was no reasonable cause to detain him. He approached the police to make a complaint and there was nothing to suggest he was a suspect in any offence.

After reviewing case law in the area of investigative detention, Judge Baird Ellan ruled the detention lawful. She stated:

> Here…there was a complaint of a fight, perhaps a road rage situation. It involved two vehicles. [The Corporal] noted that the accused's vehicle was clearly linked by description to the scene, and the accused by his own admission was involved in the incident. Coupled with his agitated state, and the discovery of an apparent weapon at the scene, the circumstances, in the Corporal's view, necessitated an investigation as to the accused's role in the incident. While it does not appear that anything came of that investigation other than the offence before me, the fact that the accused may have been a victim and no more does not detract from the assessment, which relates to what was reasonably necessary, in the mind of the officers at the time. [para. 14]

And further:

> …While that cause must, as with arrest grounds, be objectively supported, the standard is not that which might be applied on quiet reflection, but that appropriate in the exigencies of the moment. Here, viewed objectively and in the totality of the circumstances as outlined above, I am of the opinion that the officer had sufficient cause to detain the accused to investigate further his role in the events about which the caller complained, particularly in light of the discovery at the scene of what appeared to be a handgun. It must also be considered whether the resultant interference with the accused's liberty was reasonable and minimal. In my view it was, particularly in light of the fact that it was the accused who initially approached the officer. This was not an arbitrary or random stop as considered in many of the cases. There was a particular crime alleged or at least a report of an incident that may have been criminal. At the point when the accused was detained, there was little more interference with his liberty than there would have been if the officer had simply taken his complaint, other than to change the complexion and focus of the officer's inquiry. Whether the subsequent search and ensuing events were reasonable is a separate question related to the scope of the

search power following a justified detention. [para 16]

However, opening the CD case exceeded the scope permissible as incident to investigative detention. Although the pat down search, visual inspection of the car's interior, handcuffing, and placing the accused in the police vehicle, as well as the removal of the CD case from the accused's possession, were all reasonable in the circumstances, opening the CD case was not. At the time the CD case was opened, it was no longer in the accused's physical possession nor accessible to him. In ruling the examination of the CD case unreasonable, Judge Baird Ellan stated:

> …[T]he question becomes whether there was a realistic concern that officer safety required the immediate inspection of the case, where it was no longer accessible to the accused, and would not become accessible, unless he was released from custody without an arrest or escaped from police custody and from his handcuffs. If arrested as a result of the investigation, the case could clearly be searched incidentally. If released following elimination of the cause for his detention, the ancillary police safety authorization to search must also be taken to be eliminated.
>
> It is doubtful, in my respectful view, that an authorization to search after investigation before returning an item seized to its owner…could survive *Mann*. In any event, bearing in mind that this is a warrantless search and the burden of proof rests with the Crown, I do not believe the Crown has met the onus of establishing on a balance of probabilities in this case that the incidental officer safety search authorization extends to an item outside the area readily or reasonably accessible to the accused while he is detained. I therefore find that the search of the CD case was a breach of the accused's section 8 rights. [paras 31-32]

After finding the admission of the evidence would bring the administration of justice into disrepute, it was excluded under s.24(2) of the *Charter*.

Complete case available at www.provincialcourt.bc.ca

DID YOU KNOW

…that as of April, 2005 the RCMP was 22,561 strong, an increase of 322 over 2004. Personnel breakdown, including all ranks and civilians, was as follows[8]:

Position	2005	2004[9]	Change
Commissioner	1	1	0
Deputy Commissione	7	5	+2
Assistant Commission	24	24	0
Chief Superintendent	52	56	-4
Superintendents	143	135	+8
Inspectors	346	331	+15
Corps Sergeant Major	1	1	0
Sergeant Major	6	7	-1
Staff Sergeant Major	5	1	+4
Staff Sergeants	742	704	+38
Sergeants	1,616	1,568	+48
Corporals	2,928	2,777	+151
Constables	10,136	10,039	+97
Other regular members	n/a	4	-4
Special Constables	82	n/a	+82
Civilian Members	2,605	2,585	+20
Public Servants	3,867	4,001	-134
Total	**22,561**	**22,239**	**+322**

Coming Soon
(see p.40)

Note-able Quote

Circumstances and situations do colour life, but you have been given the mind to chose what the colour shall be—John Horner Smith

[8] Source: http://www.rcmp-grc.gc.ca/html/organi_e.htm [December 23, 2005]
[9] Source: http://www.rcmp-grc.gc.ca/html/organi_e.htm [May 17, 2004]

GUNS & GROW OPERATORS DON'T GO TOGETHER

R. v. Wiles, 2005 SCC 84

The accused plead guilty to two charges of unlawfully producing cannabis. During the first offence police responded to a 911 call accidentally placed by the accused's daughter and discovered a 178 plant grow operation in the basement of the home. While out on bail for that offence, police seized about three pounds of marihuana, production apparatus including two scales and a large amount of cash, resulting in a second charge. In Nova Scotia Provincial Court the Crown sought the mandatory minimum 10 year firearms prohibition under s.109(1)(c) of the *Criminal Code*. Under this section a firearms ban is required for those who have been convicted of trafficking, possession for the purpose of trafficking, importing, or producing a scheduled substance.

At trial a police officer testified there was a nexus between the firearms ban and growing marihuana. His evidence was summarized by the Nova Scotia Court of Appeal as follows:

> [The officer] testified that in many police raids of drug production operations, it is usual to find weaponry, in particular, firearms, even in the case of simple marihuana grow operations. Such weapons are kept by the operators, not necessarily to deal with police but, to protect the operation from others who would steal the product or proceeds. These vary from a single .22 calibre rifle readily available by the front door of the operation to a virtual arsenal of firearms. In some cases, the guns are rigged as mantraps. It was his evidence that the presence of guns is driven by basic economics. A mature marihuana plant is currently worth about five hundred dollars in product. A grow operation with multiple plants can easily be valued in the thousands of dollars. It is an investment worth protecting from the perspective of the operators. The THC (tetrahydrocannabinol) level in marihuana is now sufficiently high that in certain areas it trades pound for pound with cocaine. The concern about the presence of weapons is a significant one for officers involved in drug raids. They approach every such raid expecting firearms. [10]

The trial judge, however, refused to prohibit the accused, finding s.109(1)(c) of the *Criminal Code* constituted cruel and unusual punishment under s.12 of the *Charter*. In his view, there was not necessarily a connection between the purpose of the mandatory prohibition and the offence of growing marihuana. Since there was no violence involved with the accused growing his marihuana, a firearms prohibition would be 'grossly disproportionate' to the offence[11]. He also concluded that the *Charter* violation could not be saved by s.1. The judge then read down the mandatory prohibition to a discretionary one and refused to make the prohibition order.

The Crown appealed to the Nova Scotia Court of Appeal, which overturned the judge's decision. Justice Bateman, authoring the unanimous appeal court judgment, found it was clear from the police officer's evidence that the prohibition had a legitimate connection to a s. 7 Controlled Drugs and Substances Act (*CDSA*) offence. Furthermore, Justice Bateman was satisfied that the weapons ban related to a recognized sentencing goal—protection of the public, and, in particular, protection of police officers engaged in drug enforcement operations. Moreover, the protection of public safety through a reduction in the misuse of firearms is a valid state interest. Additionally, Justice Bateman found the ameliorative effect of s. 113 of the *Criminal Code*, which allows a judge to consider unacceptable hardship and exercise some discretion in making a prohibition order, eliminates any unacceptable consequences of a firearms prohibition if it deprives a person of a livelihood or sustenance.

The accused then brought a further appeal, this time to Canada's highest court. The Supreme

[10] see R. v. Wiles, 2004 NSCA 3, at para. 49
[11] see R. v. Wiles, 2004 NSCA 3

Court first examined the test of what constitutes cruel and unusual punishment under s.12 of the *Charter*. In determining whether a punishment is cruel or unusual it must be so excessive as to outrage standards of decency and the court must be satisfied if it is so grossly disproportionate that Canadians would find it abhorrent or intolerable. If the punishment is grossly disproportionate for the offender, then a s.1 Charter justifiability analysis will be undertaken. If the punishment is not grossly disproportionate for the offender, then the court will consider whether or not the punishment is disproportionate for reasonable hypotheticals, but not far-fetched, marginally imaginable, remote, or extreme examples.

The accused first argued that the mandatory prohibition does not distinguish between small and large grow operations. The hypothetical the accused presented was that of a 75 year old grandmother experimentally growing a single marihuana plant. If convicted under s.7 of the CDSA she would face the same weapons prohibition as a large commercial grower. Secondly, he submitted that there was no consideration on whether or not the underlying offence involved violence or the offender posed a risk to public safety.

Justice Charron, writing the unanimous judgment for the nine member Supreme Court, agreed with the Nova Scotia Court of Appeal. In her view the accused did not establish that the imposition of a mandatory weapons prohibition order constituted cruel and unusual punishment. The prohibition had a legitimate connection to production offences and related to a recognized sentencing goal—the protection of the public, including the protection of police officers engaged in the enforcement of drug offences. As well, the state interest in reducing the misuse of weapons was valid and important. Furthermore, "the sentencing judge gave insufficient weight to the fact that possession and use of firearms is not a right or freedom guaranteed under the Charter, but a privilege" said Justice Charron. She continued:

> [Firearms possession] is also a heavily regulated activity, requiring potential gun-owners to obtain a licence before they can legally purchase one…[R]equiring the licensing and registration of firearms was a valid exercise of the federal criminal law power. If Parliament can legitimately impose restrictions on the possession of firearms by general legislation that applies to all, it follows that it can prohibit their possession upon conviction of certain criminal offences where it deems it in the public interest to do so. It is sufficient that [the accused] falls within a category of offenders targeted for the risk that they may pose. The sentencing judge's insistence upon specific violence, actual or apprehended, in relation to the particular offence and the individual offender takes too narrow a view of the rationale underlying the mandatory weapons prohibition orders.
>
> Insofar as the individual offender is concerned, there is no evidence as to any effect that the prohibition orders will have on [the accused], apart from the loss of the firearms already in his possession. Since he was legally in possession of the firearms, the sentencing judge inferred that he was a recreational hunter and shooter. Even assuming that to be the case, the loss of this privilege would not support the sentencing judge's finding of gross disproportionality. As a twice convicted producer of a controlled substance, [the accused's] loss of the privilege to possess firearms for recreational purposes falls far short of punishment "so excessive as to outrage our standards of decency". In addition, the mandatory provision does not have a grossly disproportionate effect having regard to any reasonable hypothetical. Again here, I agree with the Court of Appeal that the sentencing judge did not properly weigh the ameliorative effect of s. 113 of the Criminal Code which permits the court to lift the order for sustenance or employment reasons….[para. 9-10]

The accused's appeal was dismissed.

Complete case available at www.scc-csc.gc.ca

NO CHARTER ISSUES ARISE FROM ROUTINE BORDER POCKET SEARCH

R. v. Hudson,
(2005) Docket:C42765 (OntCA)

The accused, in company two friends and his two-year-old child, was refused entry into the U.S. because he did not have his son's birth certificate. Upon returning to Canada he was referred to a secondary inspection where he was taken to a private room and told to empty his pockets. Five counterfeit $50 bills were discovered and he was arrested and charged with possession of counterfeit currency.

At trial in the Ontario Superior Court of Justice the judge excluded the evidence of the counterfeit bills under s.24(2) of the *Charter*, ruling the pocket search was an unreasonable search and seizure under s.8. In her view, the Customs officer conducted a warrantless search, which was prima facie unreasonable, without any cause to suspect illegal activity or possession of contraband.

The Crown appealed to the Ontario Court of Appeal arguing the trial judge erred in her analysis. Justice LaForme, authoring the unanimous judgment, first examined border crossing jurisprudence. Some of the legal considerations include:

- Searches that are reasonable at the border may be unreasonable under other circumstances. For example, the police may not arbitrarily stop and search a citizen walking down the street, but travellers can be stopped by officials crossing an international boundary to ensure they or the goods they carry are permitted entry. As well, the law relating to the reasonableness of searches in general may not necessarily be relevant to the reasonableness of border searches conducted by customs officers;
- Travellers crossing an international boundary fully expect to be screened, typically involving the production of identification, travel documentation, and a search process; and
- There are three distinct categories of border searches:
  1. routine questioning and procedures, which may involve a search of baggage or a pat or frisk of outer clothing;
  2. strip or skin searches conducted in private; and
  3. body cavity search involving medical doctors, X-rays, emetics, or other highly invasive means

Moreover, the greater the intrusiveness of the search the greater the requisite justification and constitutional protection.

Justice LaForme noted that the trial judge was in error when she found the pocket search rested between a category 1 and category 2 search. Rather than finding the pocket search fell into one of the three discrete categories, she incorrectly placed it on a continuum. Justice LaForme stated:

> In this case…the search did not fall between categories one and two; rather, the search was clearly a category one search. In the context of a border search, asking the [accused] to turn his pockets inside out was no more invasive than a search of baggage, or a purse, or a pat down or frisk of outer clothing. At no time was the [accused] strip-searched or patted down. Moreover, the border search in this case had only proceeded to a secondary inspection, which remains a routine part of the general screening process…
>
> I conclude, therefore, that the trial judge erred by failing to recognize that a pocket search is a non-invasive routine screening procedure within the legitimate purpose of

border crossings, which does not raise Charter issues…[para. 38-39]

The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

2005 POLICE STATS UNVEILED

Statistics Canada has recently released its 2005 policing statistics[12]. In 2005, there were a total of 61,050 police officers across Canada, up 1,250 from last year. Ontario had the most police officers with 23,420 while the Yukon had the least at 120.

Province/Territory	2005	2004	Change
Ontario	23,420	23,214	+206
Quebec	14,753	14,426	+327
British Columbia	7,469	7,072	+397
Alberta	5,335	5,123	+212
Manitoba	2,256	2,266	-10
Saskatchewan	2,011	2,010	+1
Nova Scotia	1,624	1,615	+9
New Brunswick	1,297	1,302	-5
Newfoundland	776	766	+10
Prince Edward Island	213	207	+6
Northwest Territories	173	171	+2
Nunavut	121	123	-2
Yukon	120	121	-1
RCMP HQ & Training Academy	1,482	1,384	+98
Total	**61,050**	**59,800**	**+1,250**

Gender representation shifted 7% over the last decade with women accounting for nearly 10,600 police officers (or 17%) in 2005. British Columbia had the highest percentage of female officers at 21.0%, followed by Quebec (18.9%), Nunavut (17.4%), and Saskatchewan (17.3%). Provinces and territories having a lower percentage of women than the national average were Ontario (16.6%), Alberta (15.8%), Newfoundland (14.3%), Yukon (14.2%), Manitoba (14.1%), Northwest Territories (13.9%), New Brunswick (13.6%), Nova Scotia (13.4%), and Prince Edward Island (12.7%).

[12] Source http://www40.statcan.ca/101/cst01/legal105a.htm [accessed December 26, 2005]

ARREST NOT REQUIRED TO DIRECT & CONTROL

R. v. Johnson, 2005 ABCA 347

The accused was an intoxicated passenger in a vehicle driven by his wife that struck a pedestrian. He tried to comfort her even though the officer told him to stay away and had to be forcibly removed from the truck after he climbed in it to get a cell phone. The accused was convicted for obstruction in Alberta Provincial Court because (1) he entered the truck and tried to move its contents after being told not to touch the vehicle or anything inside and (2) he resisted the officer when being removed from the truck and refusing to leave afterwards. The accused appealed to the Alberta Court of Queen's Bench and the judge found the conviction based on entering the vehicle proper, but the resisting particulars did not have a sufficient basis.

The accused sought leave to appeal before the Alberta Court of Appeal arguing the trial judge erred, in part, by finding that a person can be directed or controlled by a peace officer without an arrest being effected. In denying the application for leave to appeal, Justice Ritter stated, "[The accused] seeks leave to argue the following question: can a police officer stop an accused and direct and control him without effecting a lawful arrest? The Supreme Court decision in R. v. Mann…addresses the scope of detention and the authority of police officers to detain without arrest." Leave to appeal was refused.

Complete case available at www.albertacourts.ab.ca

All past editions of this newsletter are available online by clicking on the Police Academy link at:

www.jibc.bc.ca

PREVENTATIVE POLICING ROADBLOCK UNCONSTITUTIONAL

R. v. Birmingham, 2005 BCPC 0489

The police set up a roadblock at the only entrance to a beach park in response to a number of violent incidents occurring in the park. The stated aim was to "monitor *Criminal Code, Motor Vehicle Act* and *Liquor Control Act* violations or anything that might jeopardize public safety." All vehicles were stopped, drivers were asked for licenses and insurance, and a cursory visual inspection was made of the vehicle interior for weapons or alcohol. In addition, vehicle occupants were asked about weapons and alcohol as well as the contents of bags or containers. The accused was stopped, identified, and found to be a prohibited driver.

At the accused's trial in British Columbia Provincial Court on a charge of driving while prohibited the roadblock supervisor testified the roadblock was used as a proactive approach to address acts of violence in the park. He also agreed there was no authority to detain vehicles in the roadblock except under the *Motor Vehicle Act*.

Judge Baird Ellan ruled the roadblock unconstitutional. Since there was no reasonable cause to detain the accused the detention was arbitrary. However, unlike arbitrary stops related to highway safety, this detention could not be saved by s.1. The road block was set up primarily to monitor weapons and alcohol entering the park—monitoring driving offences was peripheral. After reviewing a number of cases the judge stated:

> The law appears to be clear that a roadblock set up for the sole or primary purpose of detecting crime is an arbitrary detention and not one authorized by law under Section 1 of the Charter of Rights. While [the Crown] pointed to Section 33 of the *Motor Vehicle Act* requiring a driver to produce their driver's licence when requested to do so, that section does not itself provide authority for a stop of this nature, nor if it did, would that be an answer to the Section 1 issue. The question would still be whether a police officer acting under the *Motor Vehicle Act* should be permitted or is permitted to conduct random stops of vehicles in order to prevent crime in a problem area in the absence of articulable cause or grounds to stop or, I should say, any indication of an ancillary power being satisfied in the particular case.
>
> The cases have extended the Section 1 protection to police conducting vehicle stops in a limited set of circumstances and have consistently declined to extend that protection to broader uses than highway safety. Again, in this case, I do not know whether those uses might extend beyond simple highway safety or that as a major aim. The aim here was not highway but park safety. The officer agreed that foot patrols could have been used but that it was more expedient to conduct a roadblock.
>
> This was not a traffic road stop, it was a preventative policing initiative based upon complaints in the specific area but not specific articulable complaints on the night in question. That, however, did not raise it above a road stop. There was clearly no articulable cause or anything by way of an immediate complaint that might engage the ancillary police power to stop. [paras. 22-24]

And further:

> Given the location, at the mouth of a parking lot, and the catalyst, recent complaints about violence and alcohol, it is difficult to understand how a traffic purpose might really be advanced. Whether motor vehicle infractions in the parking lot might be a peripheral purpose of the stop, it was not a purpose sufficient to legitimize the primary one, in my view.
>
> This was not a situation where persons committing crimes were caught incidentally in a road stop for traffic safety purposes. It

> was aimed at catching persons who might disturb the peace in the park. That might be a justifiable purpose for a stop but the Crown did not establish that in this case through any evidence
>
> Aside from the officer's assertion that there had been recent complaints, there was no evidence to show that the area was a specific problem and that this kind of initiative was necessary to enforce the law. So I do find that there was a breach with respect to the arbitrary detention, that there was no established justification pursuant to Section 1. [paras. 26-28]

In excluding the evidence of the accused's identity under s.24(2), Judge Baird Ellan held:

> …The admission of the evidence would endorse the technique employed here, ignore the breach of the rights of this accused and all others who passed through the stop on that occasion and could provide incentive to employ such techniques in the future on the chance that the results might be admissible in court. [para. 40]

It should be noted that Judge Baird Ellan found the Crown did not present a s.1 justification, but rather let the case fall or stand on the *Motor Vehicle Act* authority. She did not rule out the Crown presenting a s.1 *Charter* justification in a future case, either through legislation or an ancillary police power. The charge was dismissed.

Complete case available at www.provincialcourt.bc.ca

SUPREME COURT DEFINES YOUTH 'VIOLENT OFFENCE'

R. v. C.D. & R. v. C.D.K., 2005 SCC 78

In two consolidated cases arising from Alberta the Supreme Court of Canada has ruled on the interpretation of the definition "violent offence" as it was found in s.39(1)(a) of the *Youth Criminal Justice Act* (*YCJA*). Section 39(1)(a) of the *YCJA* prohibits a young person being sentenced to custody unless, among other things, they committed a "violent offence."

In *R. v. C.D.*, the young person plead guilty to the *Criminal Code* offences of possessing a weapon dangerous to the public peace, arson, and breach of recognizance. The sentencing judge ruled that violence to property (vehicle arson) was a violent offence and sentenced C.D. to six months of deferred custody followed by probation.

C.D. appealed to the Alberta Court of Appeal arguing, among other grounds, that the sentencing judge erred in concluding the property offence of arson where there was no actual or attempted bodily harm was a "violent offence." The Alberta Court of Appeal dismissed C.D.'s appeal finding an offence was violent for the purposes of the *YCJA* if it "causes bodily harm, is intended to cause bodily harm, or if it is reasonably foreseeable that the action may cause bodily harm." Although the vehicle was set on fire late at night on a deserted street, the court noted that accelerants were used and there was a "risk to anyone who happened to use the street that night and anyone charged with controlling the fire" (ie. firefighters).

In *R. v. C.D.K.*, the young person plead guilty to the *Criminal Code* offences of dangerous driving, possession of stolen property, and theft. The sentencing judge found the dangerous driving offence involving a high speed police chase was a "violent offence" because there was potential for serious damage and injury. C.D.K. was sentenced to six months of deferred custody followed by probation.

C.D.K. also appealed to the Alberta Court of Appeal similarly arguing, in part, that the offence was not violent. C.D.K.'s appeal was also dismissed, the court holding that "if it is reasonably foreseeable that criminal conduct may result in bodily harm that is more than merely trifling or transitory, the offence is violent." Since high speed chases are dangerous and can easily result in serious injury or death, the sentencing judge did not err.

Both youths then appealed to the Supreme Court of Canada where the court was tasked with defining the term "violent offence" found in s.39(1)(a) of the *YCJA*. Since the term was not defined in the legislation, the court used the rules of statutory interpretation having regard to grammatical and ordinary sense of the words, the object and scheme of the Act, and Parliament's intent.

After reviewing two approaches, a force based definition (where force is exerted) and a harm based definition (where harm is suffered), the eight member majority chose the harm based meaning. The definition of "violent offence" enunciated by Justice Bastarache, authoring the majority opinion, was:

> An offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm.

A meaning capturing offences where bodily harm is *intended* or *reasonably foreseeable* was rejected. First, the court noted that something more than a guilty mind (intent) is required before punishment is imposed. Second, encapsulating a definition that includes offences where bodily harm is reasonably foreseeable is too broad and would incorporate most *Criminal Code* offences, thereby increasing the number of offences open to custodial sentences. A narrower interpretation is preferred and something more than merely committing the offence is required.

As well, there is distinction between an offence being *violent* and one that is *dangerous* (likely to result in bodily harm). Since the *Criminal Code* treats these types of offences differently, Justice Bastarache opined that the *YCJA* should also treat them differently. As a result, neither the vehicle arson nor the police pursuit was a violent offence. The appeals were allowed, the custodial sentences quashed, and the matters were remitted back to the sentencing judges for an appropriate sentence.

Justice Lebel agreed with the majority's disposition of the appeal. However, rather than adopting a harm based approach that focuses on the outcome of the crime, he suggested a fault based definition that focuses on the offences nature and/or underlying intent of the youth. Using the fault-based approach a violent offence would be defined as "an offence whereby the offender intends, threatens or attempts to cause harm."

Complete case available at www.scc-csc.gc.ca

SEAT BELT DEFENCE REJECTED: OFFICER WINS LAWSUIT

Iachetta v. Ioannone, 2005 BCSC 566

The plaintiff, a police officer, was a passenger in a police car that tried to pin a stolen vehicle in from the rear after a police chase. The defendant (driver of the stolen vehicle) reversed rapidly and crashed into the police car. The police driver was wearing his seatbelt, but the passenger officer was not, and the airbags deployed. The passenger officer was injured and sued the driver of the stolen car for damages.

At trial in British Columbia Supreme Court the defendant argued that the driver of the police car should have been partially liable for the damages because he did not exercise appropriate caution—he should have anticipated the potential accident and not stopped so close to the stolen vehicle. In rejecting this submission and holding the defendant fully liable for the accident, Justice Williamson stated:

> I do not find that submission persuasive. We have to see this in the context of a police pursuit. We have to see this in the context of the statutory obligation upon a police officer in these circumstances, not only to effect an arrest of a person who is driving what is believed to be a stolen vehicle, but

> given the behaviour of that driver, to do everything they could to make sure that that car did not go anywhere in a circumstance that was replete with danger.
>
> It is the members of the public that I am concerned about here. This was a case where a person fleeing the police had driven his car up on a sidewalk at a busy intersection at 8:30 in the morning. I can find absolutely no fault whatsoever with the action of [the officer] in manoeuvring his car as he did on that morning. [paras. 20-21]

The defendant also argued for a reduction in non-pecuniary damages because the officer was not wearing his seatbelt. In addition to proving the officer had no seatbelt on, the defendant would also need to prove that not wearing it was negligent and if he had worn it, the injuries would have been less serious. In assessing whether the officer was negligent in not wearing his seatbelt, Justice Williamson first examined the *Motor Vehicle Act* regulations exempting an officer from wearing a seatbelt during the course of their duties. Section 32.04(4) of the regulations states:

> When a peace officer has reasonable and probable grounds to believe the use of a seat belt assembly would obstruct the performance of his duties, the peace officer and any passenger is exempt...

In holding that the damages should not be reduced for contributory negligence because the plaintiff was not wearing his seatbelt, Justice Williamson stated:

> With respect to this case, I agree with the defence that the plaintiff had time to put the seat belt on. That wasn't the concern. Indeed, [the officer], who was driving this car, had put his seat belt on. But important in this case is the testimony from the police officers about general police procedures, the different role of the driver and the passenger, that is to say the other police officer in the car doing a pursuit. The driver concentrates on driving. The passenger is the one who does the radio broadcasting and uses the computer, and, when he is able to, assists the driver in observations of potential dangers. But more important than that, when the chase ends, it is the passenger who has the duty to make first contact with the suspect, and it is the driver who is to be the cover officer, which is in accord with common sense. The driver is driving a car in difficult circumstances, and the first thing he should do is secure that car in a stopped position before he starts jumping out of the car.
> So I have no doubt in accepting the evidence of the officers that that is the practice. It seems to me to be a most salutary one.
>
> The evidence of the plaintiff was the difficulty is that if one puts on one's seat belt there is an interference with the equipment belt that the police officers wear, which includes, of course, a radio; in some circumstances a baton; -- we have seen them in court many times and we have seen them on the street many times, I can say -- a sidearm and so forth. It was the evidence of the plaintiff that in that circumstance one does not know what is going to happen -- indeed, that was evident in this case. No one expected, no one in the police car expected to happen what did happen. Whenever a pursuit comes to a halt, and it may be a sudden halt, the passenger police officer has to leap from the car with dispatch, with alacrity, and he says there will be delay in exiting the car if that belt gets caught up in his equipment, which it does. [paras. 58-60]

And further:

> I go back to the *Motor Vehicle Act* regulation. I conclude that the plaintiff's not using a seat belt in this particular circumstance manifests a reasonable belief on his part that the use of the seat belt would obstruct the performance of his duties. I ask myself, what if the person in that car had drawn a gun on a crowded street with citizens coming out of Starbucks coffee shop or walking down the sidewalk? A split second while the officer disentangled himself from a tangled seat belt could have been fatal. I think it was reasonable and is reasonable in those sorts of circumstances, for a police

> officer to rely upon the exemption that is permitted him in the seat belt regulations, and not do up his seat belt. [para. 62]

Furthermore, the judge added, there was no evidence the injuries would have been worse if the officer had been wearing his seatbelt, given the deployment of the air bag. The "seatbelt defence" was rejected and the officer was awarded $17,500 for injuries suffered from the defendant's reckless, malicious, and outrageous conduct.

Complete case available at www.courts.gov.bc.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (b) **a privilege**—see *R. v. Wiles* (at p.29 of this publication). Justice Charron stated, "possession and use of firearms is not a right or freedom guaranteed under the Charter, but a privilege."

2. (a) **true**—see *R. v. Munro* (at p. 20 of this publication). Justice Low stated, "there is no requirement in law that a search warrant be obtained if the search is conducted incidentally to the lawful arrest of the suspect for any of three reasons: to ensure the safety of the police and the public; to protect evidence from destruction or…for 'the discovery of evidence which can be used at the arrestee's trial'."

3. (a) **true**—see *R. v. Arsenault* (at p. 23 of this publication). Justice Deschenes stated, "the demand under s. 254(2) was unauthorized and unlawful…because the device…used to collect the fail result, was not proved to be an approved screening device."

4. (b) **false**—see *R. v. Spitale*, (at p. 25 of this publication). Justice Routhwaite stated, "During investigative detention officers may conduct a protective pat-down search of the detainee where they believe on reasonable grounds that their safety or the safety of others is at risk". See *also R. v. Mann*, where Supreme Court of Canada Justice Iacobucci wrote, "The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances."

5. (a) **true**—see *R. v. Hudson* (at p. 31 of this publication). Justice LaForme stated, "a pocket search is a non-invasive routine screening procedure within the legitimate purpose of border crossings, which does not raise *Charter* issues."

UPCOMING APPEALS

Here is a sneak peek at some of the appeals to be heard before the Supreme Court of Canada in 2006 that will be important to law enforcement.

R. v. Shoker (see Volume 5 Issue 1 for a case summary of the British Columbia Court of Appeal decision) Scheduled to be heard on February 14, 2006. Issue: constitutionality of a probation condition requiring a person submit to a breath test on demand of a peace officer.

R. v. Chaisson (see Volume 5 Issue 5 for a case summary of the Newfoundland Court of Appeal decision) Scheduled to be heard on March 15, 2006. Issue: investigative detention and evidence admissibility.

R. v. Clayton (see Volume 5 Issue 2 for a case summary of the Ontario Court of Appeal decision) Scheduled to be heard on May 18, 2006. Issue: constitutionality of a police roadblock used is response to a gun call.

GOVERNMENT TOUGHENS CHILD SEX LAWS

Canada's federal lawmakers have created a new voyeurism provision in the *Criminal Code* through Bill C-2 and have increased maximum sentences and added minimum penalties for child sex and other crimes.

Voyeurism

Under Canada's new voyeurism law, a hybrid offence carrying a maximum sentence of five years in prison by indictment was added to the formerly repealed s.162 of the *Criminal Code*. The new section reads:

> s.162 (1) *Criminal Code*
> Every one commits an offence who, surreptitiously, observes—including by mechanical or electronic means—or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
> (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
> (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
> (c) the observation or recording is done for a sexual purpose.

A "visual recording" is defined as including "a photographic, film or video recording made by any means." However, paragraphs (a) or (b) are not offences if the person carrying out the activity is a peace officer acting under the authority of a general warrant issued pursuant to s.487.01 of the *Criminal Code*.

Voyeur—one obtaining sexual gratification from seeing sex organs and sexual acts; *broadly* : one who habitually seeks sexual stimulation by visual means. (source: Merriam Webster Online Dictionary www.m-w.com)

Anyone who prints or has in their possession voyeuristic recordings for the purpose of printing also commits an offence:

> s.162 (4) *Criminal Code*
> Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available.

Section 162(6) creates a defence for a voyeurism charge "if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good." Section 162(7), however, states that "the motives of an accused are irrelevant" and "it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good."

Child Sex Crimes

Several of the child sex crime sections in the *Criminal Code* have had the maximum penalties increased and minimum penalties added (see Child Sex and Other Offence Sentencing Grid on p.39). One ancillary consequence of adding a minimum punishment to an offence is that a *conditional sentence* under s.742.1 of the *Criminal Code* cannot be imposed.

A "conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders…who…will serve a sentence under strict surveillance in the community instead of going to prison [and whose] liberty will be constrained by conditions to be attached to the sentence… ." R. v. Proulx, [2000] 1 S.C.R. 61 (S.C.C.)

Child Sex and Other Offence Sentencing Grid

Offence	Mode	Old Punishment	New Punishment
Sexual interference s. 151 Cr. C.	Indictable	Max. 10 yrs	Max. 10 yrs Min. 45 days
	Summary	Max. 6 mos	Max. 18 mos Min. 14 days
Invitation to sexual touching s.152 Cr. C.	Indictable	Max. 10 yrs	Max. 10 yrs Min. 45 days
	Summary	Max. 6 mos	Max. 18 mos Min. 14 days
Sexual exploitation s.153 Cr. C.	Indictable	Max. 5 yrs	Max. 10 yrs Min. 45 days
	Summary	Max. 6 mos	Max. 18 mos Min. 14 days
Making child pornography s.163.1(2) Cr. C.	Indictable	Max. 10 yrs	Max. 10 yrs Min. 1 yr
	Summary	Max. 6 mos	Max. 18 mos Min. 90 days
Distributing child pornography s.163.1(3) Cr. C.	Indictable	Max. 10 yrs	Max. 10 yrs Min. 1 yr
	Summary	Max. 6 mos	Max. 18 mos Min. 90 days
Possessing child pornography s.163.1(4) Cr. C.	Indictable	Max. 5 yrs	Max. 5 yrs Min. 45 days
	Summary	Max. 6 mos	Max. 18 mos Min. 14 days
Accessing child pornography s.163.1(4.1) Cr. C.	Indictable	Max. 5 yrs	Max. 5 yrs Min. 45 days
	Summary	Max. 6 mos	Max. 18 mos Min. 14 days
Parent procuring sexual activity s.170 Cr. C.	Indictable (if<14 yrs)	Max. 5 yrs	Max. 5 yrs Min. 6 mos
	Indictable (if 14-17 yrs)	Max. 2 yrs	Max. 2 yrs Min. 45 days
Householder permit sexual activity s.171 Cr. C.	Indictable (if<14 yrs)	Max. 5 yrs	Max. 5 yrs Min. 6 mos
	Indictable (if 14-17 yrs)	Max. 2 yrs	Max. 2 yrs Min. 45 days
Living off avails prostitute < 18 yrs s.212(2) Cr. C.	Indictable	Max. 14 yrs	Max. 14 yrs Min. 2 yrs
Prostitution with person < 18 yrs s.212(4) Cr. C.	Indictable	Max. 5 yrs	Max. 5 yrs Min. 6 mos
Duty to provide necessities s.215(3) Cr. C.	Indictable	Max. 2 yrs	Max. 5 yrs
	Summary	Max. 6 mos	Max. 18 mos
Abandoning child s.218 Cr. C.	Indictable	Max 2 yrs	Max. 5 yrs
	Summary	n/a	Max. 18 mos

Note-able Quotes

On child pornography …

[N]o one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences.—Chief Justice McLachlin[13]

****

Because of their physical, mental, and emotional immaturity, children are one of the most vulnerable groups in society, particularly with regard to sexual violence. Child pornography plays a role in the abuse of children, exploiting the extreme vulnerability of children. Pornography that depicts real children is particularly noxious because it creates a permanent record of abuse and exploitation.—Justices L'Heureux-Dubé, Gonthier and Bastarache[14]

[13] R. v. Sharpe, [2001] 1 S.C.R. 45 at para. 28 (for the majority)
[14] R. v. Sharpe, [2001] 1 S.C.R. 45 at para. 169

Leadership Through Emotional Intelligence

POLICE LEADERSHIP 2006 CONFERENCE

POLICE LEADERSHIP 2006 CONFERENCE

April 10 to 12, 2006, Vancouver, BC

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Police Leadership
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Leadership in policing is not bound by position or rank. The Police Leadership 2006 Conference will provide the police community with an opportunity to engage in a variety of leadership topics that will emphasize and highlight emotional intelligence in policing. The conference brings together some of the world's outstanding authorities on leadership and emotional intelligence who will present current, lively, and interesting discussions on leadership and emotional intelligence. Attending the Police Leadership 2006 Conference is an opportunity to hear some of the leading edge speakers on leadership and emotional intelligence.

Conference speakers include; Eddie Compass, Former Chief, New Orleans Police Department; John King, Assistant Chief of Police, Montgomery County Department of Police; Mark Andrew, General Manager, Westin Bayshore Resort and Marina; Rick Dinse, Chief of Police, Salt Lake City Police Department; Richard Boyatzis, Author, Primal Leadership, Professor; Stephen Covey, Author, The 7 Habits of Highly Effective People, Professor; John Furlong, CEO, VANOC; Lieutenant-General Romeo Dallaire O.C., C.M.M., M.S.C., C.D. (Retired); Bob Wright, Q.C and Cara Johnston, international speaker, trainer and personal development coach.

CONFERENCE REGISTRATION

Leadership 2006 Conference
Justice Institute of BC
Attn: Registration Office
715 McBride Boulevard
New Westminster, BC, V3L 5T4
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Beautiful downtown Vancouver provides a picturesque backdrop for the Police Leadership 2006 Conference. The host hotel, the Westin Bayshore Resort and Marina, offers state-of-the-art facilities, excellent delegate accommodation rates, and promises to be an enjoyable venue for the conference. Conference delegates will receive special conference room rates if accommodation is booked prior to March 9, 2006. Delegates are encouraged to book accommodations early.

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For more conference information visit the conference website at www.policeleadership.org or you can contact the Police Leadership 2006 Conference coordinator, Ken Davies ☎ 604-528-5865 ✉kmdavies@jibc.bc.ca